Dec. 22. Aff'd Affirmed

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SUPREME COURT OF THE UNITED STATES.

No. ~~279~~ 192. 1006 7.
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MOSES C. MORDECAI, ISAAC E. HERTZ, JOSEPH A. ENSLOW, and ISAAC R. MORDECAI, trading under the firm of MORDECAI & Co., Appellants,

vs.

W. & N. LINDSAY, Owners of the Schooner "Mary Eddy," &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

GIDEON, Printer.

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In the Admiralty.

THE UNITED STATES OF AMERICA,
South Carolina District.

Pleas before the Honorable Robert B. Gilchrist, Judge of the District Court of the United States for South Carolina District.

It is thus contained:—

Be it remembered, that on the sixth day of April, A. D. 1854, comes into court Messrs. Brown and Porter, attorneys of the said court, and exhibit a libel in the case of

Libel.

MORDECAI & COMPANY
vs.
SCHOONER "MARY EDDY."

And the same being read and filed, is in the words following, to wit:—

Mordecai & Company, consisting of Moses C. Mordecai, Isaac E. Hertz, Joseph A. Enslow, and Isaac R. Mordecai, exhibit this libel in a case of contract, civil and maritime, against the schooner "Mary Eddy," now lying at the port of Charleston, in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, whereof J. W. Hinckley now is, or lately was, master, her boats tackle, apparel, and furniture, and against all persons intervening for their interest therein. And thereupon the said Mordecai & Co. do allege and articulately propound as follows:—

First. That on or about the 15th day of March, 1854, the said schooner "Mary Eddy," whereof the said J. W. Hinckley was master, being then in the port of New Orleans, State of Louisiana, and designed on a voyage upon the high seas, and within the flux and reflux thereof, and within the admiralty and maritime jurisdiction of this honorable court, to wit, from the said port of New Orleans to the port of Charleston, State of South Carolina—Hall & Rodd, of the said port and city of New Orleans, made a contract with the said J. W. Hinckley, as such master, whereby he agreed, in consideration of certain freight, to convey eighty hogsheads of sugar, and also twenty-two hogsheads of sugar, of the value of six thousand dollars, from the said port of New Orleans to the said port of Charleston, and there to deliver the same in good order and condition to the libellants Mordecai & Company, saving and excepting only the dangers and accidents of the seas and navigation, of whatever nature and kind. And that the said Hall & Rood, on the

same day delivered to the said master the said sugars in good order, and received a bill of lading therefor, which they transmitted to the said libellants.

Second. That the said libellants, Mordecai & Co., are interested and have a property in said sugars.

Third. That the said sch'r Mary Eddy shortly afterwards departed on her said voyage; but the said master as aforesaid not regarding his duty in that respect, nor his promise and undertaking to convey and deliver the said sugars (although no dangers or accidents of the seas or navigation prevented him from so doing), but on the contrary thereof, hath neglected and refused to deliver the said hogsheads of sugar, although the said libellants have offered to pay the freight upon the delivery of the same, in accordance with the bill of lading; by reason whereof the said libellants have sustained damage to the amount of six thousand dollars, for which they claim reparation in this suit.

Fourth. That the premises are correct and true.

Wherefore the libellants pray that process in due form of law may issue against the said schooner Mary Eddy, her boats, tackle, apparel, and furniture, and that this honorable court will pronounce for their aforesaid demand, and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice may appertain, and as the court is competent to give in the premises.

MORDECAI & CO.
J. E. HERTZ.
BROWN & PORTER, Libellants' Proct'rs.

Sworn to 5 April, 1854. H. Y. GRAY, Dist. Cl'k.

Warrant.

Let a warrant of arrest issue, returnable to-morrow, 7th April, at 11 o'clock A. M. R. B. GILCHRIST, D. J.

At Chambers, 6th April, 1854.

April 7th, 1854.

The court met, &c. Present, his Honor R. B. Gilchrist.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

The marshal returned that he had arrested the sch'r Mary Eddy, as commanded.

Monition.

Ordered, that a monition issue, returnable on Wednesday next, at 11 o'clock A. M.

Order to take Testimony.

With the consent of Messrs. Brown & Porter, libellants' proctors,

and on motion of Mr. Ellis De Treville, deft's proctor, it is ordered that this case be referred to Mr. Commissioner Gilchrist to take testimony, and report the same to this court.

WEDNESDAY, 10 April, 1854.

The court met, &c. Present, his Honor R. B. Gilchrist.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

The marshal returned the monition in this case, and proclamation was duly made.

Claim and Answer of J. W. Hinckley.

Claim and Answer.

The United States of America, South Carolina District:

In Admiralty.

To the Honorable Robert B. Gilchrist, Judge of the District Court of the United States, in and for the District of South Carolina.

And now comes Jacob W. Hinckley, master of the said schooner, "Mary Eddy," and for answer to the libel of Mordecai & Company against the said schooner, doth allege and articulately propound as follows:—

First. That W. N. Lindsay are the true and bona fide owners of the schooner Mary Eddy, and that he, the said Jacob W. Hinckley, is now the master of the said schooner, and as such master has the possession and is the lawful bailee thereof for the said W. N. Lindsay.

Second. And this respondent, for answer to the first article of the said libel, answers, that the truth and fact was and is, that on or about the 15th day of March, 1854, the said Hall and Rodd made a contract with this respondent, as master of the said schooner, whereby this respondent agreed, in consideration of certain specified freight, to convey eighty hogsheads of sugar, marked A, (N 4;) and twenty-two hogsheads of sugar, marked Velasco, A; and twenty-one barrels of golden syrup (the aggregate value of which this respondent does not know), from the said port of New Orleans to the said port of Charleston, and there to deliver the same to the said Mordecai & Company, in the manner and on the terms and conditions as set forth in the said bill of lading given by this respondent to the said Hall & Rodd, a copy of which said bill of lading is hereto annexed: that the other matters contained in the first article of said libel this respondent admits.

Third. To the second article of the said libel, this respondent answers, that whatever property the said libellants may have in said sugars, this respondent believes, and doth allege and propound, that the same is subject to the lien of this respondent for the specific agreed upon in the bill of lading aforesaid.

Fourth. That as to the matters contained in the third article of said libel, the truth and fact is, and this respondent doth allege and propound, that the said sch'r Mary Eddy, having proceeded on her said voyage, arrived at Charleston aforesaid, on the 31st March last, with the said sugars and syrup in good order on board; and this respondent, as master aforesaid, immediately gave notice to the said Mordecai & Co. of the arrival of the said Mary Eddy, and of the sugars and syrup aforesaid, so laden on board thereof, and offered to deliver the said sugars and syrups in good order to the said Mordecai & Co., upon the payment of the freight due thereon, according to the aforesaid bill of lading.

Fifth. And for further answer to the third article of said libel, the truth and fact was and is, and this respondent doth further allege and propound, that afterwards, to wit, on the 3d and 4th days of April inst., the said Mordecai & Co., having received at the wharf where the said schooner had landed them, the twenty-one barrels of syrup aforesaid, and three hogsheads of the sugar aforesaid, and taken the same into their possession, and drayed them off to their store, refused to pay the freight due on the said syrups and the three hogsheads of sugars aforesaid; that thereupon this respondent declined to deliver the residue of the said sugars to the said Mordecai & Co., until the freight due thereon, as well as the freight due on the delivery aforesaid, was paid or secured to this respondent.

Sixth. That afterwards, to wit, on the 4th of April, the said freight due on the said twenty-one barrels of syrup and the said three hogsheads of sugar, as well as on the residue of said sugars, not having, in the meantime, been paid or secured, and the said Mordecai & Co. having declined and refused to pay the said freight until the said sugars were removed by them to their store, or until possession of the same had passed to them, this respondent, master aforesaid, proceeded to unload the said residue of sugars, and when landed on the wharf, this respondent gave reasonable notice of the same to the said Mordecai & Co., and that the same would be delivered to them in good order on the payment of the freight due thereon; and the said Mordecai & Co., refusing to pay the said freight, or to give security for the payment of the same, and to the end that the lien of this respondent upon said sugars might not be lost, this respondent retained and still retains the same in his custody.

Seventh. That this respondent has at all times, since the arrival of the said schooner at the port of Charleston aforesaid, been ready and still is ready to deliver the said sugars, or cause the same to be delivered, to the said Mordecai & Co., on their paying or securing the freight due thereon.

Eighth. That the said Mordecai & Co. have not paid to this respondent the aforesaid freight, or any part thereof, tho' often requested to do so; but, on the contrary, utterly neglect and refuse to pay the same.

Ninth. That all, and singular, the premises are true.

Wherefore, this respondent prays this honorable court would be pleased to pronounce against the libel aforesaid, and condemn the libellant in costs, and otherwise right and justice administer in the premises.

E. DE TREVILLE, Respondent's Proctor.

JACOB W. HINCKLEY.

Sworn to before me, this 10th April, 1854.

R. C. GILCHRIST, U. S. Comm'r.

Stipulation.

The United States of America, South Carolina District.

Know all men by these presents, that we, J. W. Hinckley, master of the American schooner Mary Eddy, and Thomas S. Budd, merchant, of the city of Charleston, in the district aforesaid, are held and firmly bound unto Thomas D. Condy, Marshal of the United States for the District of South Carolina, in the full and just sum of twelve thousand dollars, to be paid to the said Thomas D. Condy, as marshal aforesaid, his certain attorney, successor in office, or assigns; to which payment, well and truly to be made and done, we bind ourselves, and every of us, our and every of our heirs, executors, and administrators, for the whole and in the whole, jointly and severally, firmly by these presents. Sealed with our seals, and dated at Charleston, in the district aforesaid, the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-four, and in the 78th year of the independence of the United States of America.

Whereas, a warrant has been issued from the District Court of the United States for the District of South Carolina, holding admiralty jurisdiction against the American schooner Mary Eddy, whereof the said J. W. Hinckley is master, in a cause of civil and maritime jurisdiction, wherein Moses C. Mordecai, Isaac E. Hertz, Joseph A. Enslow, and Isaac R. Mordecai, called Mordecai & Co., are libellants; and whereas, the said sch'r Mary Eddy, has been arrested, and is in the custody of the marshal of the said district: and whereas the said J. W. Hinckley is desirous of releasing the said sch'r Mary Eddy from arrest, under the provisions of the act of Congress of the United States, approved the 3d of March, in the year of our Lord one thousand eight hundred and forty-seven, and the said J. W. Hinckley and Tho's S. Budd have become security under the said act.

Now the condition of the above obligation is such, that if the said J. W. Hinckley shall abide and answer the decree of the said Court in the said cause, then the above obligation to be void and of no effect, or else to remain in full force and virtue.

JACOB W. HINCKLEY, [L. S.]

THO'S S. BUDD. [L. S.]

Signed, sealed, and delivered in presence of—

JULIUS A. BLAKE.

Hearing of the case.

Wednesday, 3d May, 1854.

The court met, &c. Present, his Honor R. B. Gilchrist.

MORDECAI & CO.
vs.
SCH'R MARY EDDY.

Mr. Porter read the libel. Mr. De Treville read the answer.

The commissioner's report of the testimony was read (which vide post, p. 11).

Mr. Porter was heard on the part of the libellants.

Adjourned.

Thursday, 4th May, 1854.

The court met, &c. Present, his Honor R. B. Gilchrist.

MORDECAI & CO.
vs.
SCH'R MARY EDDY.

Mr. De Treville was heard on the part of sch'r Mary Eddy, and Mr. McCrady was heard in reply for the libellants.

Court adjourned.

Copy of the evidence taken before Commissioner Gilchrist, under an order of reference,

In the case of MORDECAI & CO.
vs.
Schooner MARY EDDY. } Libel.

Present—Mr. Porter for libellants,
" " E. De Treville, for respondent.

James Salvo, sworn, says: That he is a clerk of Mordecai & Co. Witness went down to the Mary Eddy on Tuesday, the 4th of April, about 10½ o'clock, for the purpose of getting Mr. Mordecai's consignment, which consisted of 102 hogsheads of sugar and 21 barrels of syrup. Saw the captain of the Mary Eddy. Witness asked the captain for Mr. Mordecai's sugars. The captain said, that the last time Mr. Mordecai had given him a great deal of trouble, and he could not deliver the sugars unless the freight was paid on the wharf. Witness then returned to the office, and not finding his employer, he returned to the vessel. The captain left the vessel with witness, and went to Captain Budd's office. T. S. & T. G. Budd were the consignees. The captain went up stairs, and in a short time returned, saying that Captain Budd was not in. Witness then went to his office. Mr. Hertz* told witness to go and tell the captain that he would hold him responsible for all injuries done to the sugars in consequence of their detention on the wharf. Witness went to the wharf and found Mr. Enslow* there. Witness, there-

* Of the house of Mordecai & Co.

fore, told Mr. Enslow the message, and did not deliver it to the captain. Witness heard the conversation between Mr. Enslow and the captain. The captain said, that he had been told that reclamation had been made for loss of weight on a previous consignment by this same vessel by the house of Mordecai & Co. Mr. Enslow positively denied it. Captain Budd was some little distance off. Mr. Enslow told witness that every hogshead of sugar that was in perfect order was to be rolled one side and sent to the store, and to pay freight on those sent to the store on the wharf. The captain of the Eddy was by at the time. Witness took three hogsheads of sugar which were in very good order. Witness in rolling aside the sugar, saw one hogshead that was crushed. The mate asked witness if he was not going to take that hogshead. Witness answered no, that he would not. Captain Budd asked the negro cooper if that hogshead could be mended. He said, no. The bilges of the hogshead were mashed in. Witness sent three hogsheads he had selected to the store, and went himself to arrange them, and sent the drays back for more; they returned without. Witness then asked Mr. Hertz for money to pay the freight for the hogsheads he had taken. Mr. Hertz refused to give it to him, and told him to return to the wharf, and tell the captain of the Eddy, that he would be held responsible for all injuries resulting to the sugars from detention on the wharf. There were about forty or fifty hogsheads on the wharf about this time. Some of these hogsheads were in a very bad condition—that is, one had a stave broken—others were mashed in, and one had a hoop off. The general appearance of the sugars was bad; the hogsheads looked stained and wet. Witness is in the habit of receiving sugars, and speaks comparatively.

Cross-examined.

The difficulty referred to between Mr. Mordecai and Captain Bud, is this: some time previously a consignment of sugars was received through Captain Budd. One hogshead of that consignment, when received at the store, was entirely empty. Mr. Mordecai refused to pay freight on that hogshead, and did not pay it. The sugar was examined at the store by Mr. Enslow and one of the port wardens. The freight on this consignment was paid at the house of Mordecai & Co. The captain was discharging when witness went down on the wharf on the morning of the fourth of April; about thirty or forty hogsheads of Mr. Mordecai's parcel were on the wharf. Witness did not remain more than ten minutes on the wharf at this time. The last time witness went to the vessel on that day, was about one o'clock; there were then about forty or fifty hogsheads. The captain was not then discharging; he was standing with Captain Budd on the hogsheads. The hogsheads landed on the wharf could be examined by witness; he had several negro hands with him. About dark the previous evening witness was on the wharf, and received twenty-one barrels of syrup; these were in good order; no freight was paid

thereon. The first interview witness had with the captain, he said, "the last time I brought sugar for you, you gave me a great deal of trouble with the payment of freight, and now you must pay freight on the wharf." Witness carried this message to Mr. Hertz, who told him to return with this message, "that he would hold him responsible for the injuries done the sugars on the wharf." Witness only took three hogsheads at the order of Mr. Enslow, because he had but three drays on the wharf. He sent the drays off, each with a load; intending to return for the rest. The next day, witness went on the wharf in the afternoon, about 4½ or 5, and saw no sugars on the wharf. Saw none that had been discharged the day before. It is not the custom of the house of Mordecai & Co. to pay freight on the wharf. They usually receive the goods in their store—inspect them, and see if they are in perfect order. If they are in perfect order, freight is paid thereon; if not, witness reports to his employers, and they make some arrangement about it.

In reply. Every captain hitherto has acquiesced in this arrangement; they have never had any difficulty before this. Witness delivered the second message sent by Mr. Hertz to the captain of the Eddy about holding him responsible for the injuries resulting to the sugars by detention on the wharf.

(Signed) JAMES SALVO.

Sworn to before me this 24th April, 1854.

R. C. GILCHRIST, U. S. Commissioner.

April 25, 1854.

Present—Mr. Porter,
" " De Treville.

Charles T. Mitchell, sworn, says: That he is a merchant in Charleston, in the habit of receiving consignments. With his house, it has always been customary to deliver the goods on the wharf to the order of the party, and then to call for the payment of freight at a reasonable time after, say a week or ten days—sometimes longer. So far as witness knows, this is the general practice with merchants. The reputation of the house of Mordecai & Co. is very good. Witness would not hesitate to deliver them any amount.

Cross-examined.

If a consignment comes to witness, he usually receives the goods on the wharf, and is not called on for freight till sometime afterwards; sometime not for a month. There is no difference with regard to coastwise vessels. If the goods are in good order, it is the custom to pay for them as soon as called on. If damaged, the captain is forthwith notified—and if the damage is such as falls on the vessel, deduction therefor is made from the freight. Witness has never paid freight on the wharf. If any man was to ask him to do such a thing, he would take it as an insult. It

has never been demanded of him. Has never had occasion to demand on his part from any consignee the payment of freight on the wharf; but in one instance, he threatened to do it. Thinks by commercial law, he would have a right to do so, if the party were doubtful as regards their ability to pay, or if he expected to receive any trouble in the collection of freight. When witness receives any goods as consignee, his clerk examines the goods on the wharf, and notifies witness of the damaged ones. When these are received at the store, he personally subjects them to a thorough examination, invariably sending for the captain to be present.

In reply. Witness never knew of an instance where freight was demanded on the wharf. Has no personal knowledge of usage to that effect.

In reply. Never heard of any case in Charleston where freight was demanded on the wharf.

In reply. As to the right to do so, thinks it a question of law. As to the fact, has never heard of a case in which it was done.

(Signed) C. T. MITCHELL.

Sworn before me, this 25th April, 1854.

R. C. GILCHRIST, U. S. C.

Capt. George T. Trescott, sworn, says: That he has been a shipmaster in the trade from New Orleans to Charleston, and the Havana trade, for ten or fifteen years. Is now an inspector of the South Carolina Insurance Company. Was on board the Eddy about 9 or 10 o'clock on the day after she commenced discharging her cargo. Witness examined the stowing of her cargo—went down into the hold; went there as an officer of the Insurance Company: noticed the manner of loading, and thought it bad stowing. Many of the hogsheads being stowed athwart-ships, and many on their heads. From what witness could see, a large number were so stowed. At least two-thirds of what witness saw were so stowed. Stowing athwart-ships is bad, particularly with sugar and anything liquid, because the casks roll, imbedding themselves into each other, breaking the casks. The mate should superintend the stowing of the cargo; the second mate, if there be one; if not, as was in the case of the Eddy, it is the first mate's.

Witness asked the mate why the hogsheads were so stowed? He replied, that the hogsheads were very heavy, and they had great difficulty in getting them in; that they had been obliged to use jack-screws, which witness thought wrong and unusual.

It is not usual to stow goods athwart-ships; witness would never allow it. They are put in athwart-ships to save labor; it is easier to roll them in. It is usual and best to stow sugar fore and aft; all barrels and hogsheads should be so stowed, with coinings and dunnage between the casks to protect their bilges. There is no way to stow hogsheads athwart-ships to make them as safe as when stowed fore and aft. Does not know if his company has had any question

with this vessel on this trip. If there had been, witness would have reported this as bad stowage, and the vessel would have been held responsible. Witness examined the conditions of the hogsheads: some of the staves were thin, not more so than ordinary. Three hogsheads were so perfectly mashed in that the vessel had to furnish new ones. The cargo was generally out of order. Witness saw some three or four hogsheads down in the hold besides the aforementioned ones that were more or less stove. Some of the staves were broken in the middle; such injury cannot be well remedied—it makes a bungling job. Would not, as captain of a vessel, take a hogshead so repaired as in good order. Never knew jack-screws to be used before this in stowing New Orleans sugar; it must mash the hogsheads in. Was ten years in the trade. For the greater part of the ten years he collected the freight himself, delivering the cargo on the order of the consignee, and afterwards collecting the freight bills. Never demanded freight on the wharf. Thinks it the prevailing practice to discharge and collect freight afterwards.

Cross-examined.

Witness went down to the vessel the second day of the vessel's discharging. Saw several of the consignment to the house of Mordecai & Co. on the wharf, and one particularly in the hold, that was broken; and another on the wharf also broken, with two-thirds of the sugar out. The one broken in the hold was broken in the bilges; it was on the ground tier. The vessel was discharging while witness was there; there were forty or fifty hogsheads on the wharf. The hogsheads were generally stained from drainage. There was a great deal of sugar in the hold—waste sugar from the hogsheads. All the damaged hogsheads could have been coopered—though not to be rendered in as good order as when received. Never, while in the trade, did witness ever bring a cargo in as bad a condition as this was in. Though witness was in the habit of delivering the freight, and afterwards collecting the freight money, had he ever anticipated difficulty in the collection of it, he would have stored the cargo in the name of the consignee, subject to his order and the payment of freight.

In reply. The bad condition of this cargo witness attributed wholly to the stowing athwart-ships, and the use of jack-screws.

(Signed) GEO. F. TRESCOT.

Sworn to before me, this 25th April, 1854.

R. C. GILCHRIST, U. S. C.

April 26th, 1854, at 4½, P. M.

Present, Mr. Porter,
" " De Treville.

John Brady, sworn, says: That he is the wharfinger of Brown's wharf. Witness received from the schooner Mary Eddy 51 hogsheads on the 4th of April, and 48 hogsheads on the 5th, subject to

the order of Captain Hinckley or his agent. Witness gave the captain his receipt, stating the condition of the hogsheads: ten of them wanted hoops, also some ("I observed 4,") having broken staves, being thin, bad casks. These hogsheads were in this condition when first stored.

Cross-examined. Has stored and seen a great deal of sugar in worse hogsheads, and very little in better. Had occasion to roll this sugar to another storehouse, and without any injury; some four or five of them had thin staves; the good hogsheads had no thin staves; those that wanted the hoops were good hogsheads.

(Signed) JOHN BRADY.

Sworn to before me, this 26th April, 1854.

R. C. GILCHRIST, U. S. C.

Mr. Porter introduced in evidence the several exhibits herewith filed, and marked exhibits "A," "C," and "D."*

Mr. Porter, on the part of the libellant, introduced as evidence the invoice herewith filed, and marked "Exhibit G."

R. C. GILCHRIST, U. S. C.

April 26th, 1854.

Evidence for Respondent.

Present, Mr. Porter,
" " De Treville.

It is admitted by Mr. Porter, on the part of Mordecai & Co., that 21 barrels of syrup, and three hogsheads of sugar, have been received, and no freight paid thereon.

Seth Cole, sworn, says: That he is first mate on board the schr. Mary Eddy, running from New Orleans to the port of Charleston, S. C. The cargo of sugars consigned to Mordecai & Co., of 102 hogsheads, was received on the wharf in New Orleans; does not know where the sugars came from. The schooner arrived in Charleston the 31st of March; saw several of the aforesaid hogsheads, about 102, landed on the wharf in as good order as hogsheads of sugar usually are. The barrels of syrup were also landed in good order. The Mary Eddy is a staunch and tight vessel—does not leak of any consequence, not enough to do her good. None of the hogsheads were injured, except by the pressure of the cargo, as hogsheads usually are; not many were pressed in. Those pressed in were coopered as soon as landed, at the instance of the vessel, and made in as good order as the rest of the cargo. There were other sugars for persons other than Mordecai & Co. in no better order than this portion of the cargo, which were delivered to their respective consignees. The captain did not commence discharging his cargo until Monday, the 3d of April. The barrels of syrup before spoken of were discharged on Monday; does not know whether all were. Thinks that a barrel or two were not discharged until Tuesday. The captain continued to discharge from 7 o'clock in the morning until 4 in the

* See the Correspondence in Petition of Appeal.

afternoon, until he got through. The cargo was principally hauled away before dark. Mr. Mordecai's sugars were carried away (not by Mordecai & Co.) after sunset. It did not rain while they were discharging. The sugars were stowed in the hole: the syrups were placed on the deck. Saw some one of the house of Mordecai & Co. on the wharf, looking after the sugars, objecting to receive some of the hogsheads, saying they were damaged, and wishing to take others that were very good; thinks he was a partner—was told so by the delivering clerk, and he spoke as one in authority, speaking of the house of Mordecai & Co. as "our house." He objected to receive the hogsheads and pay freight at the same time on the wharf, but that he would pay freight on those in perfect order at "our house," when delivered on the wharf. He refused to receive the sugars, and pay freight on the wharf, but that he would pay freight on them at "our house;" that all the hogsheads must be in perfect order. That he would pay freight on the whole of it if in perfect order; that he would not pay for a portion of it. At the time of this conversation they were discharging, and a number of the hogsheads were on the wharf—about 40 hogsheads.

Cross-examined. This conversation was with Captain Budd and the captain of the Eddy. Witness superintended the landing of the cargo—part was stowed athwart-ship, thinks about 30 or 40 hogsheads; none of Mr. Mordecai's were so stowed. It is usual to stow sugar athwart-ship; the stevedore used jack-screws; this, also, is usual with sugar. There were chocks under some of the casks not under the bilges of the hogsheads; it is not usual to put them there. Some of the hogsheads were pressed in by the cargo; none of the staves of this consignment were broken. On Tuesday, 4th of April, 51 of these hogsheads were landed—about one-half. Some of the other consignees paid freight on the wharf as they took away the hogsheads; thinks Mr. Cobia was one of them; thinks he had 30 or 33; did not take them away at one time, but paid as he took them away. None of Mr. Mordecai's consignments formed the ground tier. Does not remember saying to Mr. Mordecai that the ground tier was mashed. Did say to some one while discharging the cargo, that he thought that some of the ground tier was pressed. Does not know the customs of this port; does not think it the usage to pay freight on the wharf—has frequently, however, seen it done.

In reply. The hogsheads were bedded and coined, as is usual, with sugar, and were otherwise properly stowed. Does not pretend to know anything of commercial usage—is only the mate of the vessel. It is not unusual for the captain to refuse to deliver the cargo without payment of freight, if he suspects any difficulty to be thrown in his way in the collection of it.

In reply. Three or four hogsheads were started—is certain that one belonged to Mordecai & Co. Finished discharging sugars on

Wednesday, 5th of April, and the cargo on Thursday, 6th April. Mr. Mordecai's cargo went into the hold last, and came out first.

In reply. The hogshead of Mr. Mordecai that was started, was emptied of the sugar in it, which was placed in another good hogshead. No waste was made while the change was being made.

(Signed) SETH COLE.

Sworn to before me, this 10th April, 1854.

R. C. GILCHRIST, U. S. C.

April 25th, Afternoon session.

James B. Owens, sworn, says: That he was a clerk of T. S. and T. G. Budd at the time of the arrival of the Mary Eddy. Went down to the schooner at the time of her arrival, to deliver the goods and collect the freight. Messrs. Mordecai & Co., S. S. Farrar & Brother, Wm. Enston, Henry Cobia & Co., H. T. Street & Co., were among the consignees. The consignments of Mordecai & Co., and Cobia & Co., S. S. Farrar & Bro., were sugars and molasses. Notice was given to the clerk of Mordecai & Co. of the arrival of their consignment the first day. Mordecai & Co. sent down a clerk to receive the syrups; no freight was paid thereon. The next day, Tuesday, the 4th of April, three hogsheads of sugar were delivered to the clerk of Mr. Mordecai; about forty or fifty hogsheads of Mr. Mordecai's sugar were then on the wharf. No freight was paid on the aforesaid three hogsheads. The agreement between Mr. Enslow and the captain before any of the hogsheads were removed was, that the good hogsheads were to be selected and put one side, and to pay the freight on all which were selected out, and take them. The proposition came from either Captain Budd or the captain of the Eddy. Witness does not know who made the proposition; he received his orders from Captain Budd. Mr. Mordecai's clerk selected the three hogsheads; Mr. Enslow was by at the time. Mr. Mordecai did not send the drays back that day nor the next. All the hogsheads discharged the first day were stored by the wharfinger at the command of the captain of the Eddy after sunset. The same was done with those discharged the next day. Witness did not demand payment of freight, but told Mr. Mordecai's clerk that the hogsheads would be delivered on the payment of freight. Mr. Cobia paid freight on his consignment on the wharf. Witness was directed not to deliver the consignments of Mordecai & Co. and of Cobia & Co., unless freight was paid on the wharf. Witness delivered the twenty-one barrels of syrup before he received this order.

(Signed) JAMES B. OWENS.

Sworn to before me, this 25th of April, 1854.

R. C. GILCHRIST, U. S. C.

Captain James Ross, sworn, says: He is the chairman of port wardens. Was down on the wharf after the survey of the hatches of the Eddy; the survey of the hatches was made on the 31st of

April; that of the cargo was made on the 4th. Witness was not down there at all until the 4th of April. The cargo was of sugars. When witness went down, hogsheads were on the wharf. Some of the staves of the hogsheads were very thin. Some of the hogsheads were as thin as any he had ever seen. The stowage was very good. There was a hogshead that was very bad; witness recommended that its contents should be put into another hogshead: he ordered a cooper to do it. Found the cargo well stowed, bedded, coined, &c. The hogsheads pressed in, witness thought, was owing to the thinness of the staves. Saw drainage, but no indication of water on the sugars. The Eddy is a tight, staunch vessel. Witness had several coopers with him; he ordered them to cooper all the hogsheads that required it; he only ordered one hogshead to be started into another. Understood that some of the sugar belonged to Mr. Mordecai and Mr. Cobia. Some hogsheads were bad and some good; understood from the cooper that he had coopered fifty. Must always expect it in a cargo of sugar to have it more or less injured; it almost always requires coopering. Several hogsheads looked as if they had been aboard another vessel before this. Witness was down at the Eddy on the 4th and 5th of April. Has been a captain for many years; has been carrying sugars nearly all his life. The best mode of stowing is fore and aft. When sugar is placed on end, as it sometimes is, they must expect to pay for it. They do it in tight vessels and run the risk. To stow it athwartships is also good. This cargo was stowed fore aad aft; some hogsheads athwart-ships. Was down in the hold once—was frequently at the hatchway, and looked down on the cargo. Has traded to this port for a long time. Has known instances where refusals were made to deliver the cargo without payment of freight. On one occasion, Mr. Thos. G. Bubb told Mr. Chafee in witness' presence, that he should not have his goods unless he paid freight; that if he would assure him that there should be no difficulties, he might have it. Mr. Chafee said that he would make none, and gave his word and honor that there should be none. Witness believes he got his goods. Witness made a regular survey, and certified to it. He was requested by the captain of the Eddy to go down to the wharf.

(Signed) JAMES ROSS.

Sworn to before me, this 25th April, 1854.

R. C. GILCHRIST, U. S. C.

Charles Linning, sworn, says: Is one of the wardens of the port of Charleston. Was at the Eddy on the first of April, and found the hatches well secured. Went down on the 4th and 5th, and surveyed the cargo himself; went down into the hold. The cargo consisted of sugars mostly. The hogsheads were well stowed; never saw any better stowed. The cargo generally was well stowed; never saw any better. Has been in this office four or five years, and has

some experience in this matter; has been seven years at sea; was mate of a vessel about three years. Saw a great many hogsheads pressed in. The staves were "compressed," which witness thinks was owing to the thinness of the staves. Saw no sign of sea water, but considerable drainage of sugar on the skin of the vessel; the hogsheads were beautifully dunnaged. Some of the upper tier were coined on the ground tier. Saw the hogsheads landed. The hogsheads were not landed in as good condition as he has seen hogsheads come out of a vessel, owing, he thinks, to the thinness of the staves. The cargo was carefully landed. Saw a great many of the hogsheads on the wharf; some of these were coopered and made of a merchantable condition. Some of the hogsheads had one-third of the contents out—one or two of them. Witness tasted the sugar, and perceived no appearance of salt.

(Signed) CHARLES LINNING.

Sworn to before me, this 25th April, 1854.

R. C. GILCHRIST, U. S. C.

Mr. De Treville, proctor for the schooner Mary Eddy, also introduced in evidence the other exhibits herewith filed, and marked exhibits "B," "E," and "F."* R. C. GILCHRIST, U. S. C.

April 25th, 1854.

Present: Mr. Porter & McCready, proctors for libellants; De Treville, proctor for respondent.

Captain Thomas S. Budd, sworn, says: His house, the firm of T. S. & T. G. Budd, is the consignee of the schooner Mary Eddy, which arrived here about Saturday, the 1st of April. Witness sent down his discharging clerk on that day. The cargo mostly consisted of sugars —Messrs. Mordecai & Co., H. T. Street & Co., and Cobia & Co., were among the consignees; their consignments were sugars. Witness gave the usual instruction to his delivering clerk, giving notice through the papers to Mr. Mordecai and the other consignees of the arrival of the vessel. Witness was sent for on the 4th of April to go down to the schooner. Witness went down to the wharf, and there saw Mr. Enslow and the captain. Witness told Mr. Enslow that he was instructed not to deliver the freight off the wharf until freight was paid. Thinks there were then about thirty hogsheads on the wharf. Witness told Mr. Enslow that he was sorry, but that he would not deliver the freight unless freight money was paid. Mr. Enslow consented to pay the freight on the wharf, provided the hogsheads were in good order. Saw Mr. Enslow go among the hogsheads and select about fifteen hogsheads. Witness was by at the time, and told Mr. Enslow that he would cooper every hogshead that required it, and if he wished, would start every hogshead into another. Witness then requested the captain to go up with him to Mr. Mordecai's. They found Mr. Mordecai at his desk. Witness told Mr.

*See the Correspondence in Petition of Appeal.

Mordecai that he regretted the difficulty, and offered to advance the freight to the captain, if he, Mr. Mordecai, would assure him on his honor that he would pay him without making any deduction for drainage. Mr. Mordecai replied, that he was not sure that they were in good order; witness acknowledged that many of them wanted coopering, on the wharf, but none were damaged. Witness said that he was willing to send for the port wardens, and have them inspected on the vessel's account, and that he would have the hogsheads put into such order as would be approved of by the port wardens, at the vessel's expense. Mr. Mordecai refused to submit the matter to the port wardens, alleging that they had nothing to do with an article after it was landed. Witness then offered to leave the matter to the decision of James Chapman, promising to abide by it. Mr. Mordecai offered to leave it to Mr. Samuel Lord or the Chamber of Commerce. Witness objected to Mr. Lord because he was not as large a ship owner as Mr. Chapman, and to the Chamber of Commerce, because it could not be carried to the wharf to examine the barrels. Witness offered to leave it to Messrs. Cay & Aveilhe, which Mr. Mordecai refused. He then offered to leave it to any other house that they could agree on, and to start the whole cargo, if necessary, rather than have any difficulty. Mr. Mordecai wished, as he said, to receive the consignment in his store, and there subject it to an examination, and if it agreed with the bill of lading, to pay the freight at his store. This was before any correspondence passed between them.

The above conversation about the payment of freight was excepted to by Mr. Porter, taken subject to the exception. (Exceptions overruled by the court.)

Witness has been a sailor some time in every capacity. This cargo looked in as good order as any cargoes of sugar generally are when from New Orleans. Examined the hogsheads with the port wardens. The hogsheads were broken, owing to the thinnesss of their staves, the rolling of the ship, and loading and unloading. Witness only started one hogshead; does not know whether it was Mr. Mordecai's. When Mr. Mordecai refused to pay freight, he kept his consignment on the wharf until sundown, and then stored it. Some of the sugars were stored that night, and those taken out the next day were stored that day. Saw that every hogshead was put in good order—in such order as he would receive if consignee. Witness has been always ready to deliver the consignment to Mr. Mordecai on payment of freight. The captain of the Eddy had a difficulty with Mordecai & Co. about the payment of freight on a previous trip. When witness went to Mordecai & Co. himself, they paid freight, making such deduction as he, witness, allowed. Mordecai & Co. had the goods in possession several days before they would pay freight. The vessel was ready to start when freight was paid. Mr. Mordecai was absent at the time. When he returned, he told witness that had he been here he would not have made the settlement which his house did. The goods were in the possession of Mr. Mordecai, and no freight

paid thereon from the time the vessel discharged to the time she was ready for sea. The difficulty originated about the contents of a hogshead being washed out. When Mr. Enslow told him what it was, he was astonished that it was such a small matter, so different from what he had heard. They agreed to leave it to Mr. Heriot, which was done, and it was settled in five minutes—freight of that hogshead being deducted, and the rest of the freight was immediately paid. Witness knows of instances where consignments were not delivered without payment of freight on the wharf. It is not, however, a usual thing. Has himself refused in his own business; it is his custom to do so, if he doubts the solvency of the house, or fears a difficulty in the collection of freight, that deductions be exacted. As a master of a vessel, has refused in three instances in Liverpool, New York, and Charleston to deliver without payment of freight.

Cross-examined. On Tuesday, about 30 of Mr. Mordecai's hogsheads were discharged. In the conversation with Mr. Mordecai, at his store, Mr. Mordecai asked the captain why they proposed arbitration, if any of the hogsheads were in bad order? Witness answered, that some of them wanted coopering. Mr. Mordecai then said, that he would bring the matter to a point; he then took a pen and gave his answer in writing, which was the first letter of the 4th of April. Witness does not consider a hogshead that is to be coopered as damaged cargo; but when the contents are injured in any way, then witness considers it as damaged. If a hogshead is mashed in, and part of the sugar out, he does not consider it as damaged—does not consider the cargo as damaged, but impaired in value. Some of the staves of the hogsheads were mashed in, but not broken.

(Signed) THOS. S. BUDD.

Sworn to before me, this 26th April, 1854.

R. C. GILCHRIST, U. S. C.

Gustavus Street sworn, says: That he is a member of the firm of H. T. Street & Bro. Was a consignee of the Eddy on her last trip. Was called on by Mr. Hertz to go down to the Eddy with Mr. Cohen on the 5th of April. Witness was asked to give his opinion about the condition of Mr. Mordecai's consignment. Several of the hogsheads were on the wharf, others in the hold, and some in the wharf storehouse. Witness said that the sugars ought to be coopered and put into a good receiving order, and then Mordecai & Co. ought to receive them. Mr. Hertz then took witness to his own store to show him some sugars from the same plantation, received by some other vessel, and asked witness to notice that the hogsheads were in a different condition from those received by the Eddy. Witness answered that the hogsheads were not of as good a make; that the staves of those by the Eddy were very thin. Witness' house often receives consignments of sugars from New Orleans; they generally require coopering. If Mr. Mordecai's consignment had come to his house, he would have received it after the hogsheads had been pro-

perly coopered. In the case of small bills, to save the trouble of collecting the freight, witness has ordered it to be paid on the wharf before delivery.

Cross-examined. Two samples of sugar were produced, which were proved by Mr. Salvo to have been taken from the consignment of Mordecai & Co. One marked "A x 4, 80 Hhds.," the other marked "Velasco A, 16 Hhds." Mr. Street continues his testimony and says, that since the 5th of April, the decline in sugar has been about a quarter per cent. per pound, which would be from two to two and a-half each hogshead. Starting a hogshead injures it. Shifting the contents of a hogshead not only injures the sugar, but if a large number are started, the absence of the plantation mark might injure the sale of it. This is clarified sugar, which does not drain as much as raw. (Signed) G. STREET.

Sworn to before me, this 26th April, 1854.

R. C. GILCHRIST, U. S. C.

Isaac S. Cohen, sworn, says: That he was called on by Mr. Hertz to examine the hogsheads in the hole of the Eddy, to see how they were stowed. Witness saw several hogsheads on the wharf, some of them required coopering; the generality of them were good. Mr. Hertz went down with him into the hold of the Eddy; noticed the manner in which some of the hogsheads were stowed; some were stowed endwise, and some crosswise, which witness thought, might account for the injury that some of the casks had sustained. The injury that the hogsheads had sustained was nothing more than what witness could expect in such a consignment. Witness went with Mr. Hertz and Mr. Street to the wharf-store; saw some three or four of Mr. Mordecai's hogsheads of sugar, which appeared to be in bad order. When witness went to the wharf, he saw some thirty or forty hogsheads, of which most were Mr. Mordecai's: one was broken in.

After surveying the sugar in the wharf-store, witness went to Mr. Hertz's store to look at some hogsheads which had been received by another vessel. Witness remarked, that the staves of those hogsheads were much thicker than those of the Eddy. Had this consignment come to witness, he would have received it after the hogsheads injured had been well coopered. The sugar inspected at Mr. Mordecai's store was of the same character as this sugar. The hogsheads were in no worse condition than they usually are. Witness, in one instance, was refused a consignment unless he paid freight on the wharf. He submitted to it, and sent a young man to pay the freight as the goods were delivered. Witness does not know whether it was paid on the wharf, or at the house of Messrs. Cobia. The final settlement on this consignment was at witness' office, and he there received a receipt in full; subsequently, he settled all other freight bills in the usual way; the general usage is, to deliver the freight to responsible parties, and collect the bill afterwards. Never heard of any exception to this usage, saving his case

with Mr. Cobia, and a similar case between Messrs. Cobia & T. G. Budd. When the goods are received in his store, if everything is right, and the goods are in order, the freight is paid as soon as demanded. The practice is to call for it at any time before the vessel is ready for sea.

Cross-examined.

The sugars produced as Mr. Mordecai's are clarified sugars, which will drain a little; one-third of a hogshead will not, however, drain out. The sugar market is now very dull. Thinks sugar has declined since the 5th of April perhaps one-fourth per cent. Thinks the price of the first quality now produced at that time was 7 cents per pound, and of the second quality 6½. The raw sugars will lose about ten pounds on a hogshead in a voyage from New Orleans to Charleston; these sugars would not lose more than three pounds.

(Signed) I. S. COHEN.

Sworn to before me, this 26th April, 1854.

R. C. GILCHRIST, U. S. C.

Decree of District Court.

The United States District Court, District of South Carolina.

In Admiralty.

MORDECAI & CO.
vs.
Schr. MARY EDDY.

Libel on Bill of Lading.

Judgment.

The libel filed in this case alleges, among other things, that on or about the 15th of March last, the schr. Mary Eddy, being then in the port of New Orleans, State of Louisiana, and designed on a voyage from that port to the port of Charleston, in this State, a contract was made with the master of that vessel whereby he agreed, in consideration of certain freight, to convey one hundred and two hogsheads of sugar, of the value of six thousand dollars, to the port of Charleston, and there to deliver the same in good order and condition to the libellants, saving and excepting only the dangers and accidents of the seas and navigation, of whatsoever nature and kind. It was further averred, that on the same day the sugars were delivered in good order to the master of the schr. Mary Eddy, who gave a bill of lading therefor; but the libellants allege, that the said master, not regarding his duty and undertaking to deliver the sugars, hath neglected and refused to deliver the same to them, although they have offered to pay the freight upon their delivery, in accordance with the bill of lading; in consequence of which, the libellants ask a decree for payment of their demand, with costs.

The answer filed by the master of the schr. Mary Eddy, insists that the sugars mentioned in the bill of lading referred to in the pleadings, are subject to the lien of this respondent, for the specific freight agreed upon in the bill of lading; and avers, among other things, that the sch'r Mary Eddy arrived at the port of Charleston on the thirty-first day of March last, with the sugars, and twenty-one barrels of syrup, also embraced in the bill of lading, in good order on board, of which he immediately notified the libellants, and offered to deliver the same in good order to them, upon the payment of the freight due thereon, according to the bill of lading thereof. That afterwards, to wit, on the third and fourth days of April, the libellants having received at the wharf where they were landed the twenty-one barrels of syrup and three hogsheads of sugars, refused to pay the freight due on the same; that thereupon, the respondent declined to deliver the residue of the sugars to the libellants, until the freight due thereon, as well as the freight due on the merchandise previously delivered, should be paid or secured to be paid to him. That afterwards, to wit, on the fourth day of April last, no portion of the freight due on the libellants' importation having in the meantime been paid or secured, and the libellants having refused to pay the same until the sugars were removed by them to their store, or until they had obtained possession of them, the respondent proceeded to unload the residue of the sugars, and when they were landed on the wharf, gave reasonable notice to the libellants that they would be delivered to them in good order on the payment of the freight due on their importation; and the libellants refusing to pay the same, or to give security therefor, the respondent retained, and still retains, the residue of the sugars in his custody, that his lien thereon should not be lost.

These pleadings purport to raise the question as to the extent of the responsibility of a common carrier for the delivery of goods confided to him, and the nature of his lien for the payment of freight; but the points in the case are not as distinctly developed by the pleadings as they appear in the testimony at the reference before the commissioner, and in the argument of counsel on the hearing before the court.

The general principle of law, that the lien for freight attaches whether payment of it is to precede or be concomitant with the delivery of the cargo, is well settled. By stipulation in bills of lading, that the goods shall be delivered to the consignees, they paying the freight, the owner of the vessel may detain the cargo until payment of the freight, the delivery of the cargo and the payment of the freight being concomitant acts, which neither party is obliged to perform, without the other being ready to perform the correlative act, [*a.*] But the libellants appear to have considered, at the commencement of this controversy with the respondent, that there was a usage

[*a.*] Yates and others, Assignees, &c., *vs.* Ralston, 8 Taunton, p. 293.

of the port of Charleston which would affect the right of the ship-master to demand freight upon the delivery of the cargo on the wharf—that is, that in conformity with the supposed usage, they were entitled to the possession of the merchandise in the stores before freight was demandable of them; and accordingly, they informed the respondent in a letter from them, of the 4th ultimo, that if he refuses "to deliver the sugars in accordance with the usages of the port, they should at once hold the vessel and owners liable for all damages that accrue." As there has been no testimony to prove the existence of any other usage than the one already referred to, it is presumed that the libellants had reference to that supposed usage when they wrote their note; but if so, their views are not sustained by the testimony reported by the commissioner. Two witnesses were examined on this point in behalf of the libellants: one of whom stated, that he thinks that by commercial law he would have a right to demand freight on the wharf, if the party were doubtful as regards their ability to pay, or if he expected to receive any trouble in the collection of the freight; that as to the right to demand freight on the wharf, he thinks it a question of law; that as to the fact, he has never heard of a case in which it was done. The other witness stated, that he thinks it is the prevailing practice to discharge and collect freight afterwards; but that though such was his practice, if he ever anticipated difficulty in the collection of freight, he would have stored the cargo in the name of the consignee, subject to his order and the payment of freight. In opposition to this testimony, four witnesses have been examined in behalf of the respondent, one of whom stated that he has known instances where refusals were made to deliver the cargo without payment of freight. Another witness stated, that he knows of instances where consignments were not delivered without payment of freight on the wharf; that it is his custom to do so, if he doubts the solvency of the house, or fears difficulty in the collection of freight. Another witness stated, that in the case of small bills, to save the trouble of collecting the freight, he has ordered it to be paid on the wharf before delivering of the cargo; and the fourth witness stated, that in one instance, he was refused a consignment unless he paid freight on the wharf, but that the general usage is otherwise—the practice being to call for the freight at any time before the vessel is ready for sea. Now, it cannot be seriously contended on this testimony, that there is satisfactory evidence of a well established and generally well known custom and usage of the port of Charleston, to affect the principle of law hereinbefore laid down as to the delivery of the cargo and the payment of freight being concomitant acts. On the authority of Rushford *vs.* Hadfield, [*b*,] Angell, in the law of carriers, page 298, maintains that "the doctrine in respect to all commercial usage is, that to have it take the place of general law, it must be so

[*b*.] East; reports 7 vol.———, p. 229–230.

uniformly acquiesced in by length of time, that the jury will feel themselves constrained to say that it entered into the minds of the parties and made a part of the contract." The libellants having failed to prove the existence of such usage, I hold that the ship-master has a lien for the payment of the freight on each portion of the consignment as it may be delivered; and whether the delivery be on the wharf or elsewhere, provided the owner of the cargo is willing to receive the same in parcels.

Thus, for instance, to apply this principle of law to the circumstances of the case before the court: twenty-one barrels of syrup were delivered to the libellants on the 3d of April last, and three hogsheads of sugar on the following day. For these parcels of consignment, the respondent was entitled to the payment of the freight on the wharf, at the time of the delivery thereof, and he accordingly demanded it from the libellants.

This claim was, however, rejected by them, and the respondent in consequence thereof, refusing to deliver any other parcels of the consignment, the proctors of the libellants, on the 4th ultimo, at half-past 7 o'clock, P. M., addressed a letter to the respondent, in which they state that they are instructed by the libellants to inform him that they consider their whole consignment of sugars—that on the wharf as well as that in the ship—at the risk of the schooner Mary Eddy and owners; and that they are ready to pay him the freight upon his delivery to them of the entire consignment, in accordance with the bill of lading—the letter concluding with a statement, that they are also instructed by the libellants to inform him that unless this matter is adjusted to their satisfaction by ten o'clock the next day, they will proceed to libel the vessel.

This letter gives a very different aspect to the case before the court from that in which I have been considering it. The libellants do not here rest their claim upon a custom which has not been and cannot be proven to exist; but they assume a ground which is sustained by principle and by authority. The late Mr. Justice Story, in the case of certain logs of mahogany (2d Sumner, Reports, p. 601), says: "It is well known that the goods of the shipper may not only be detained for freight, properly so called, but also for hire agreed to be paid by the shipper under a charter-party for the use of the ship, if the owner of the ship retains possession of the cargo; and that the shipper cannot ordinarily insist on a delivery of the goods to him until the freight or hire is paid or secured according to the terms of agreement. But then the owner is not at liberty to insist that the goods shall not be landed before such payment or security is made. On the contrary, the shipper has a right, as it should seem by the maritime law, to insist upon examining the goods after they are unlivered, in order to ascertain whether they are damaged or not, before he makes himself liable at all events for the freight. Under such circumstances, an unlivery of the cargo becomes perfectly proper; and after it is made, the owner of the ship has a right to detain

it in his custody until payment or security for the freight. So the law is laid down in Lord Tenterden's Treatise on Shipping (Abbot on Shipping, p. 3, ch. 3, sec. 11, pp. 247, 248); and it appears to be the general rule adopted by foreign maritime nations. In the maritime ordinance of Louis XIV. (1 Valin, lib. 111, tit. 3, art. 21, p. 665) it is expressly prescribed that the master shall not retain the merchandise on board his vessel for default of payment of the freight; but he may at the time of the discharge refuse to deliver it, or cause it to be held for the freight; and Valin gives as the reason, that it would be absurd to allow the master to insist upon the payment of his freight before the goods were examined, and the damage, if any, ascertained. The modern code of France (lib. 11, tit. 8, art. 306) contains a provision very similar in its purport and objects. It declares that the master shall not retain the merchandise on board of his ship for default of the payment of freight; but he may at the time of discharging insist upon having them deposited in the hands of a third person until the freight is payed. The commentators give the same reason for this provision which is assigned by Valin. Now, what should have been the respondent's course of proceeding after receiving a letter of the libellants' proctors. The time given by them for a satisfactory adjustment of the matters in dispute is, it is true, rather brief—the letter being written at half-past 7 o'clock one evening, and the arrangement required to be effected by 10 o'clock the next morning. But I apprehend that it was in the power of the respondent to submit to the inspection of the libellants, at all events, in the course of the day named, if not by the precise time fixed by them for a settlement, the whole of their importation by the Mary Eddy, and this he certainly should have done. There were landed on the 4th of April fifty-one hogsheads of their sugar, and on the following day (the 5th) forty-eight additional hogsheads, three hogsheads of sugar and twenty-one barrels of syrup having been previously delivered to the libellants. But, although the whole importation of the libellants was thus landed, there is no evidence of an offer afterwards on the part of the respondent to deliver it in accordance with the requirements contained in the letter of the libellants' proctors. In fact, that the letter seems to have closed the correspondence between the parties, and the aid of the court was shortly afterwards invoked.

I cannot conceive the reasons of the respondent's disregarding the demand made by the libellants through their proctors, when their compliance with it would have given a very different complexion to this case. But the court cannot speculate as to reasons, and must decide the case as it is presented to its judgment. Giving it, therefore, all due reflection, I have come to the conclusion, that on the last ground considered, I must pronounce in favor of the libellants with cost, which is accordingly done.

Mr. Gray, the commissioner and clerk of this court, will ascertain the charges to be made against the respective parties to this suit,

and state the account between them. For this purpose, he is authorized to use the testimony already reported, and such further evidence as may be brought before him in relation to this point.

(Signed) R. B. GILCHRIST, D. J.

At Charleston, 16th May, 1854.

Appeal to Circ't C't.

The Sch'r Mary Eddy,
J. W. Hinckley, Claimant and Respondent,
ads.
Mordecai & Co., Libellants.

The above-named respondent, conceiving himself aggrieved by the final sentence or decree filed on the 16th day of May, 1854, in the above-entitled case, doth hereby appeal therefrom to the next Circuit Court of the United States, to be held in and for the said district: and he prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings in the cause, duly authenticated, may be sent to the said Circuit Court.

E. DE TREVILLE, Respondt's Proct'r.

Filed 24th May, 1854.

Appeal Bond to Circuit Court.

The United States of America, South Carolina District.

Know all men by these presents, that we, Jacob W. Hinckley, Thomas S. Budd, and T. G. Budd, are held and firmly bound to Moses C. Mordecai, Isaac E. Hertz, Joseph A. Enslow, and Isaac R. Mordecai, partners, trading under the firm of Mordecai & Co., in the full and just sum of eight thousand dollars, to be paid to the said Mordecai & Co., their certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the ninth day of June, A. D. one thousand eight hundred and fifty-four.

Whereas a libel was lately filed in the Court of Admiralty for the district of South Carolina, by the said Mordecai & Co., against the schooner Mary Eddy, for a cause of maritime jurisdiction on a bill of lading for the delivery of one hundred and two hogsheads of sugar, and twenty-one barrels of syrup, to the said Mordecai & Co.; and Jacob W. Hinckley, master, interposed a claim to the said schooner, in behalf of the owners, and defended the said suit, and by the decree of the court was adjudged to pay damages and costs to the libellants; and whereas the said claimant has appealed from the decree of the said court to the Circuit Court of the United States:

Now the condition of the above obligation is, that if the said Jacob W. Hinckley shall prosecute the said appeal, and shall ratify

and confirm all acts which his proctors may do in the premises in this behalf, and also appear in the said court as often as he may be required, and pay or cause to be paid all damages, costs, charges, and expenses that shall be decreed, assessed, or taxed against him, and in every respect abide by and perform the decision of the said court, then this obligation to be null and void; otherwise to remain in full force and effect. And the said Thomas S. Budd and T. G. Budd do hereby consent that in case the said Jacob W. Hinckley shall fail to prosecute his appeal with success, and to comply with the decree aforesaid, that execution may issue against them, the said Thomas S. Budd and T. G. Budd, for the full amount of the said decree, [and costs,] damages, and costs.

J. W. HINCKLEY, [L. S.]
THOS. S. BUDD, [L. S.]
T. G. BUDD. [L. S.]

Sealed and delivered in presence of
H. Y. GRAY, U. S. Com'r and Cir. and Dis't Cl'k.

The words "and costs," in line next to last, being first erased.

Approved: R. B. GILCHRIST, D. J.
June 9th, 1854.

Citation to Circ't Ct.

To Messrs. Mordecai & Co., greeting.

You are hereby cited and admonished to be and appear at a Circuit Court of the United States, to be held at Columbia, in and for the district of South Carolina, on the fourth Monday of November next, pursuant to an appeal from a decree of the District Court of the United States for said district, wherein the master and owners of the sch'r Mary Eddy are the appellants, and you are appellees, to show cause, if any there be, why the said decree should not be reversed, and speedy justice done to the parties in that behalf.

Witness the Hon. Robert B. Gilchrist, Judge of the United States for the district of South Carolina, 9th June, A. D. 1854.

R. B. GILCHRIST,
Judge of the U. States for the So. Ca. District.

We accept service of this citation.
12 June, 1854. BROWN & PORTER.

Petition of Appeal.

The United States of America, Sixth Circuit.

THE MASTER AND OWNERS OF THE SCHR. MARY EDDY, Appellants,
vs.
MORDECAI & Co., Appellees.

To the Honorable James M. Wayne, Associate Justice of the Supreme Court, and Judge of the Sixth Circuit.

The humble petition and appeal of Jacob W. Hinckley, master

of the schooner Mary Eddy, for W. and N. Lindsay, owners of the said schooner, showeth: That the said schooner Mary Eddy arrived in the port of Charleston on the 31st day of March, 1854, from New Orleans, with a cargo consisting, in part, of one hundred and two hogsheads of sugar, and twenty-one barrels of syrup, for which your petitioner had signed bills of lading, deliverable in Charleston to Mordecai & Co., upon payment of freight, to wit, six dollars per hogshead on sugar, and one dollar and forty cents per barrel on syrup. That on Monday, the 3d day of April, your petitioner, in pursuance of previous notice to the consignees, began to land his cargo, and on that day the syrup was landed and taken away by Mordecai & Co. That on the next day, the 4th day of April, forty or fifty hogsheads of the sugar consigned to Mordecai & Co. were landed, and your petitioner directed his mate to demand the freight on delivery; whereupon an altercation arose with Mordecai & Co., who insisted that the cargo should be delivered to them before the freight could be demanded; and that they would not pay the freight until they had the opportunity of inspecting the produce at their leisure, and had the cargo for this purpose in their possession, founding their claim on the custom of the port, and on a supposed common right, to set-off against the freight the damages of the cargo, if any had occurred. That, after a parley between the mate and the clerk of Mordecai & Co., about a compromise and the payment of freight, *pro rata*, on such part of the cargo as Mordecai & Co. might choose to take, Captain Budd, the consignee of the said schooner, called on Mr. Mordecai, the head of the house of Mordecai & Co., who, with the view of bringing the matter, as he said, to a point, wrote the following note:—

"Charleston, April 4, 1854.

"Capt. J. W. HINCKLEY, schr. Mary Eddy.

"Sir: Upon the delivery of the sugar on board of your vessel to our consignment, in accordance with your bill lading, we will pay you the freight on them. If you refuse to deliver the sugars in accordance with the usages of the port, we shall at once hold the vessel and owners liable for all damages that accrue.

"Your obedient servant,

"M. C. MORDECAI,
of MORDECAI & CO."

That to this note your petitioner returned at first this answer:—

"Charleston, April 4, 1854.

"Messrs. M. C. MORDECAI & Co.

"Gentlemen: Your note of this day's date is at hand—contents noted. In reply to the same, will inform you, your sugars are not ready for delivery; many of the hogsheads require coopering. When the same are in the usual order, you will be notified by

"Your obedient servant,

"J. W. HINCKLEY."

And in course of the morning, having coopered the hogsheads that appeared to be injured, he sent the following note:—

"Charleston, April 4, 1854.

"Messrs. M. C. MORDECAI & Co.

"Gentlemen: We hereby notify you that your sugars are now in good order, having employed a cooper to put them in the usual condition as other vessels deliver their cargo. To avoid any difficulty in collecting my freight, you will oblige me by paying the amount due my schr. Mary Eddy, as per bill of lading—for they will not be delivered without settling the just amount due. Should you not accede to the above, and settle the matter, the sugars will remain on the wharf until sunset, and then be stored at your expense and risk.

"Respectfully yours, &c.,
"JACOB W. HINCKLEY,
"Commander of schr. Mary Eddy."

To which note, on the same day, Mordecai & Co. replied as follows:—

"Charleston, April 4, 1854.

"Capt. J. W. HINCKLEY, schr. Mary Eddy.

"Sir: Your letter of this date, in answer to ours of same, you handed us in person at half-past one o'clock. Your last letter of this date was handed to us after two o'clock. We have only to reply that we are prepared to give you satisfactory security for your freight money, to be paid to you in accordance with the usages of this port, and upon your delivery of our property in compliance with your contract. If you refuse to do so, we shall hold you responsible for all damages; and we would further add, that we are informed that there are a large number of hogsheads of sugar on the wharf, and a notice of their being landed at this late hour will not give us time to dray them away, and store them, and therefore we hold you responsible for any damage on those that are landed.

"Yours, respectfully,
"MORDECAI & CO."

That the sugars remained on the wharf until sundown, and were then stored by your petitioner; after which, the following note was sent by the solicitors of Mordecai & Co.:—

"Capt. J. W. HINCKLEY.

"Sir: We are instructed by Messrs. Mordecai & Co. to inform you that they consider their whole consignment of sugar—that on the wharf as well as that in the ship—at the risk of the schooner Mary Eddy and her owners; and that they are ready to pay you the freight upon your delivery to them of the entire consignment in accordance with the bill of lading. That from your own admissions and conduct, they have reason to believe that part of the consignment is not in the condition you received it, and they have further reason to

believe that this damage is not included within the dangers and accidents of the seas and navigation. That they are willing to give any security for the freight, but will not consent to pay the freight as you have demanded in your letter, when a larger portion of the consignment is in your possession, under circumstances which authorize them to believe that they may sustain considerable damage. We are also instructed to inform you, that unless this matter is adjusted to their satisfaction by 10 o'clock to-morrow, they will proceed to libel the vessel.

"Very respectfully, your obedient servants,
"BROWN & PORTER,
"Attorneys at Law."

April 4, 7½ o'clock, P. M.

That the sugars were examined next day, in store and on the wharf, by the agents of Mordecai & Co., but no demand was made, nor any freight tendered. That the libel was filed on the 6th day of April, 1854, and alleges, that on or about the 15th March, 1854, the said schooner Mary Eddy being then in the Port of New Orleans, and designed on a voyage from that port to the port of Charleston, a contract was made with J. W. Hinckley, the master of said schooner, whereby he agreed, in consideration of certain freight, to convey one hundred and two hogsheads of sugar of the value of six thousand dollars, to the port of Charleston, and there to deliver the same in good order and condition to Mordecai & Co., saving and excepting only the dangers and accidents of the seas and navigation of whatsoever nature and kind. That on the same day the sugars were delivered in good order to the said master, who gave a bill of lading therefor. That the said master, not regarding his duty and undertaking to deliver the sugars, hath neglected and refused to deliver the same to the said Mordecai & Co., although they have offered to pay the freight upon their delivery, in accordance with the bill of lading; in consequence of which, the libellants ask a decree for payment of their demand, with costs.

That a claim and answer was filed by your petitioner on the 10th day of April, 1854, admitting that the said schooner Mary Eddy arrived at the port of Charleston on the 31st day of March, 1854, with the said sugars, and also alleging that twenty-one barrels of syrup are embraced in the said bill of lading, and that they were all in good order on board, of which the libellants had notice, and averring that he had offered to deliver the same in good order to the libellants upon the payment of freight due thereon, according to the bill of lading. That on the 3d and 4th days of April, 1854, the libellants received at the wharf, where they were landed, the twenty-one barrels of syrup, and also three hogsheads of sugar, but refused to pay the freight due on the same; that thereupon your petitioner declined to deliver the residue of the sugars to libellants until the freight due thereon, as well as the freight due on the merchandise

previously delivered, should be paid or secured to be paid him. That on the 4th day of April, 1854—no portion of the freight due on the consignment of libellants having, in the meantime, been paid or secured, and the libellants having refused to pay the same until the sugars were removed by them to their store, or until they had obtained possession of them—your petitioner proceeded to unlade the residue of the sugars, and that when they were landed on the wharf, gave reasonable notice to libellants that they would be delivered to them in good order on the payment of the freight due thereon. That the libellants refusing to pay the same, your petitioner retained and still retains the residue of the sugars in his custody, that his lien thereon should not be lost. That your petitioner has at all times been ready, and still is ready, to deliver the said sugars, or cause the same to be delivered to the libellants on their paying the freight due thereon. That the said sugars are subject to the lien of your petitioner for the specific freight agreed upon in the bill of lading.

That the cause came on to be heard before his Honor Robert B. Gilchrist, District Judge, on the 3d and 4th days of May, 1854, when the libellants entered into evidence to prove a custom in the port of Charleston, to the effect that sugars are to be delivered before the freight is payable, in which they failed. They also entered into evidence and examined witnesses to prove that the sugars were damaged by bad stowage, in which they also failed—as by the evidence taken in the cause, and hereto annexed, will more fully appear. That it then appeared that the supposed custom is defended on the ground that any damage which the goods may have sustained by the default of the ship is a set-off against the freight. But though the libellants introduced much evidence to establish the custom, and to establish the fact of damage done to the cargo, they failed on both points, insomuch, that the cause came at last to an issue on the mere right of the consignee to the possession of the goods discharged from any lien of the ship before the title to the freight accrues; and therefore, the decree should have been, that the libel be dismissed with costs. Nevertheless, his honor decreed for the libellants, and condemned the ship in costs, and ordered an inquiry to ascertain the damages incurred by the non-delivery of the cargo. That the said decree rests on the sole ground that the letter of the solicitors is a demand of the cargo, accompanied by a tender of the freight; whereas your petitioner insists that the said letter is not a withdrawal of the claim set up by the libellants in the first instance; that it was not so understood by the respondent nor by the libellants; that so far from withdrawing the claim to a delivery before payment, the very letter reiterates the claim; and the same contention was put forward, both by evidence and argument, in the defence at the hearing. And your petitioner submits to your honor, that no inference unfavorable to him can be drawn from his declining to answer the said letter, because, in fact, it required no answer; and if it had been intended as a waiver of the ground originally taken by the libellants, it could

have had no effect unless followed up by a demand of the goods, and a tender of freight. That your petitioner, so far from refusing to deliver the goods on payment of the freight, had even been willing to go to the point of extreme concession by receiving freight distributively on the parcels as delivered, and had no possible motive or interest, nor ever meant, to refuse, or ever did refuse, a tender of the freight. That on the other hand, the libellants never intended to make any tender, but made, and intended to make, an issue with your petitioner on the right to retain the goods for the payment of the freight. That your petitioner, therefore, humbly appeals from the said decree; and prays that the same may be reversed, and that the libellants' libel may be dismissed with costs, and your petitioner may be restored to all things which he has lost by said decree.

And your petitioner, as in duty bound, will ever pray, &c.

E. DE TREVILLE,
Appellant's Proctor.

Hearing in Circuit C't.

In the Circuit Court.

WEDNESDAY, 2d May, 1855.

The court met, &c. Present, his Honor, James M. Wayne.

MORDECAI & Co.
vs.
THE SCH'R MARY EDDY.

Appeal from the District Court.

Mr. E. De Treville read the pleadings, and was heard for the respondents. Mr. Porter was heard for the libellants.

The court adjourned.

THURSDAY, 3d May, 1855.

The court met, &c. Present, his Honor, J. M. Wayne.

MORDECAI & Co.
vs.
THE SCH'R MARY EDDY.

Mr. McCrady was heard for the libellants, Mordecai & Co.

Adjourned.

FRIDAY, 4th May, 1855.

The court met, &c. Present, his Honor, James M. Wayne.

MORDECAI & Co.
vs.
THE SCH'R MARY EDDY.

Mr. Petigru was heard in reply for the respondents, the appellants.

Adjourned.

Decree of Circuit Court.

FRIDAY, 1st June, 1855.

The court met, &c. Present, his Honor James M. Wayne.

THE MASTER AND OWNERS OF THE SCH'R MARY EDDY, Appellants,
vs.
MORDECAI & Co., Appellees

This cause having been heard upon the appeal, it is adjudged, ordered, and decreed, that the decree of the District Court be reversed, and that the libel of the appellees be dismissed with costs.

(Signed) JAMES M. WAYNE,
Assoc. Justice Sup. C't U. States.

Adjourned.

Filed 29th May, 1855.

Appeal to Supreme Court.

Circuit Court of the United States for the Sixth Circuit and District of South Carolina.

In Admiralty.

MORDECAI & Co.
vs.
THE SCHOONER MARY EDDY, her tackle, apparel, & so forth.

Mordecai & Co., to the Honorable the Chief Justice and the Associates Justices of the Supreme Court of the United States.

The above named Mordecai & Co., the libellants, conceiving themselves aggrieved by the final sentence or decree entered on the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and fifty-five, in the above entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States; and he prays that this, his appeal, may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court.

BROWN & PORTER,
Proctor for Appellants.

8th June, 1855.

Appeal-bond to Supreme Court.

United States of America, South Carolina District.

Know all men by these presents, that we, Moses C. Mordecai, I. E. Hertz, J. A. Enslow, and I. R. Mordecai, trading under the firm of Mordecai & Co., and J. C. Farrar, are held and firmly bound unto W. & N. Lindsay, in the full and just sum of fifteen hundred dollars lawful money of the United States, to be paid to the said W. & N.

Lindsay, or their certain attorney, executors, administrators, and assigns, to which payment, well and truly to be made and done, we bind ourselves, and each and every of our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the eighth day of June, A. D. one thousand eight hundred and fifty-five.

Whereas, a libel was lately filed in the District Court of the United States for South Carolina District, by the above named Mordecai & Company, against the sch'r "Mary Eddy," her tackle, apparel, &c., and the above named W. & N. Lindsay came and claimed to be the sole and lawful owners thereof; and the said court, on the 16th of May, A. D. 1854, did pronounce a decree in favor of the said libellants, with costs; and whereas, the said W. & N. Lindsay, the claimants of the schooner "Mary Eddy," afterwards interposed an appeal to the Circuit Court of the United States for the said district, which was allowed, and the said Circuit Court, after hearing argument upon the appeal, did order and decree "that the decree of the District Court be reversed, and that the libel of the appellees be dismissed with costs;" and whereas, the said Mordecai & Co. have interposed an appeal to the Supreme Court of the United States, to be holden at Washington:

Now, the condition of the above obligation is such, that if the aforesaid Mordecai & Co. shall prosecute their appeal to effect, and answer and pay all such damages and costs as shall be adjudged and decreed by the said Supreme Court, if they fail to make their plea good, and in all respects conform to and abide by such order or orders as may be made in the premises, then, and in such case, the foregoing obligation shall be void, or else to be and remain in full force and virtue.

M. C. MORDECAI, [L. S.]
I. E. HERTZ, [L. S.]
J. A. ENSLOW, [L. S.]
I. R. MORDECAI, [L. S,]
J. C. FARRAR. [L. S.]

Sealed and delivered in the presence of—

Witness to signature of Farrar,
F. L. ROUX.

Witness to signature of Mordecai & Co.,
C. W. CLEAPOR.

Acknowledged before me, this 8th June, 1855.

H. Y. GRAY,
Cl'k Cir. Court.

Citation.

United States of America.

To W. and N. Lindsay, owners of the schooner Mary Eddy, greeting:—

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, on the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-five, pursuant to an appeal from a decree of the Circuit Court of the United States for the District of South Carolina, wherein Mordecai and Company are appellants, and you are appellees, to show cause, if any there be, why the said decree should not be corrected, and speedy justice be done to the parties in that behalf.

Witness my hand at Charleston, this eighth day of June, in the year of our Lord one thousand eight hundred and fifty-five.

R. B. GILCHRIST,
Judge of the United States for the District of South Carolina.

Citation.—Filed 8th June, 1855.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

Office of the Clerk of the Circuit Court, South Carolina District.

I, Henry Y. Gray, clerk of the Circuit Court of the United States for the 6th circuit, South Carolina District, do hereby certify that the foregoing is a full, true, and complete transcript of the records, evidence, and proceedings had in the District and Circuit Courts for the aforesaid district in the above mentioned cause, herewith transmitted to the Supreme Court of the United States, in pursuance of the notice of appeal hereunto annexed.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the said Circuit Court, at [SEAL.] office in the city of Charleston, district aforesaid, this twenty-second of November, A. D. one thousand eight hundred and fifty-five.

H. Y. GRAY, Clerk.

Circuit Court of the United States for the District of South Carolina.

THE MASTER AND OWNERS OF THE SCHOONER MARY EDDY, Appellants,
vs.
M. C. MORDECAI & Co., Appellees.

To the Honorable James M. Wayne, Associate Justice of the Supreme Court, and Judge of the Sixth Circuit:

The Petition of Appeal of Jacob W. Hinckley, Master of the

Schooner Mary Eddy, for W. & N. Lindsay, owners of the said schooner:

Respectfully sheweth; that in a certain cause of admiralty and maritime jurisdiction, lately heard in the District Court of the United States, wherein the above named Mordecai & Co. were the libellants, and the above named Jacob W. Hinckley was master of the schooner Mary Eddy and respondent, his honor, Robert B. Gilchrist, District Judge, did, on the 16th day of May, 1854, pronounce in favor of the libellants with costs; and ordered the commissioner and clerk of said court to ascertain the charges to be made against the respective parties to said cause, and to state the account between them.

That your petitioner appealed from the said decree of the District Court to the next Circuit Court for the District of South Carolina. That the cause came on to be heard upon the appeal before his honor, James M. Wayne, Judge of the Sixth Circuit, on the —— days of May, 1855, when his honor ordered that the decree of this District Court be reversed, and that the libel of the appellees be dismissed with costs; that from this decree of the Circuit Court, the libellants appealed to the Supreme Court of the United States, and in that court the decree of the Circuit Court was reversed for want of jurisdiction, because there had not been a *final* decree in the District Court, and the cause was remanded to the District Court in the *same condition* in which it was before the appeal to the Circuit Court, in order that the said District Court might proceed with the case to a final decree upon such a report as the commissioner and clerk may make pursuant to the order made by the District Court in the cause; that the cause, having come back to the District Court, was heard upon its merits, and upon the report of the clerk and commissioner, and the exceptions filed by the parties, before his honor, A. G. Magrath, District Judge, who, on the 24th day of March, 1858, pronounced the following judgment and decree:—

In the United States Court, South Carolina District.

M. C. Mordecai & Company
vs.
The Schooner Mary Eddy and Owners. } In Admiralty.

Judgment.

The libellants, consignees, and owners of certain hogsheads of sugar and syrup shipped on board the schooner Mary Eddy, bound for the port of Charleston, from the port of New Orleans, filed their libel against the vessel and owners, under the contract of affreightment; to recover the value of the property so entrusted to this carrier. The pleadings having been made up, the case was heard before Judge Gilchrist, then sitting in this court, who announced that he would pronounce in favor of the libellants, with costs; and at the

same time ordered a reference to the commissioner and clerk of this court, to ascertain the charges to be made against the respective parties to the suit, and state the account between them. The respondents appealed to the Circuit Court, in which court, after hearing argument, Judge Wayne ordered that the decree of the District Court be reversed; and the libel of the appellees dismissed with costs. From this decree the libellants appealed to the Supreme Court; and in that court the decree of the Circuit Court was reversed for want of jurisdiction; because there had not been a final decree in the District Court. The case was remanded to the District Court in the same condition in which it was before the appeal to the Circuit Court; in order that the District Court may proceed with the case to a final decree, upon such a report as the commissioner and clerk may make, pursuant to the order made by the District Court in the cause. The parties have accordingly attended the clerk and commissioner; and he has filed a report, in which, after deducting freight, and allowing for drainage, he states the balance due the libellants, without interest, at $6,260 57. To this report both parties have excepted. The order of reference made by the District Court directed the clerk and commissioner, in making the account, to use the testimony already reported, and "such further evidence as may be brought before him in relation to this point." Other testimony under this order has been produced; and the case has been fully argued before me, upon the report and exceptions. Much of the testimony which has been given refers to matters, either in fact or in importance, developed since the hearing of the case in this court. The consideration of these matters is unavoidable in making up an account between the parties; and in the argument were involved many questions of law, if not novel, certainly of great interest.

That the carrier has a lien on the cargo for the freight, is now everywhere conceded. That by this lien he is entitled to retain it, to secure the payment of freight, is well established. That until acceptance of the property by the consignee, the lien at the port of delivery is the only security he has for the freight, is also clear; for, unless in the case where the consignee is the owner, or some other agreement is proved, a contract on the part of the consignee to pay, can only be implied when the consignee by the acceptance of the cargo becomes a party to the contract of which the bill of lading is the evidence. Until he accepts, against him there is no cause of action. Acceptance by a consignee of a part of the cargo may be considered evidence for a jury that he had undertaken to pay for that part; but unless upon some distinct agreement, otherwise brought home to the consignee, the undertaking to pay the whole of the freight would be derived only from the fact that all of it had been received. Young *v.* Moeler (85 E. C. L. Rep., 855). Making a claim for the goods, if the claim has been assented to, is not sufficient to raise a contract binding a consignee (Ibid). The right to

the lien being very clear, as a general rule, it remains to be seen how it may be inoperative. It may be waived, as by making a contract inconsistent with its continuance; but the inconsistency must be marked and positive, or the court will reconcile the lien with the contract. It may be lost, as by an unqualified delivery to the consignee. It may be extinguished by payment.

In this case the right of the carrier to the lien is denied. It is said the law of the place where the delivery is to be made is that which determines the construction of the contract; that the law of this State has determined unliquidated damages to be properly set off against a claim for freight; that the principle of, no debt no lien, is a rule of law: and therefore in any case where the owner shows a carrier liable in damages to an amount equal or greater than the freight which he claims to be due, at the same time and by the same proof he extinguishes the lien. (Ewarts *v.* Kerr, Rice Rep. 203.) The rule now stated under the case of Ewarts *v.* Kerr, which was trover against a carrier, is applicable to actions tried in the courts of law in the State. In actions at common law and in equity in this State, the proceedings in the Circuit Courts of the United States are generally assimilated to the proceedings in the courts of the State. But the jurisdiction in admiralty, as is known, is peculiar; nor would a rule of practice in the courts of law in this State, be admitted to operate here unless specially directed. In the Gloucester Insurance Company *v.* Younger, 2 Curtis C. C. R. 322, the principle of conforming to the decision of the Supreme Court of Massachusetts was insisted upon. But it was said, "this being a question not of mere local municipal law, but arising under the law merchant, though this court must consider with unaffected respect the decisions of the State Court, on this question they are not binding on our judgment." In Hodgson *v.* Woodhouse, 1 Cranch C. C. R. 549, a rule precisely the reverse of Ewarts *v.* Kerr was declared, in trover against the master of the vessel, for goods not delivered, the court holding, that the action could not be maintained unless the freight was tendered or paid, or the payment waived. In the Chusan, 2 Story R. 456, it was held that this court was governed by the special legislation of Congress, or in its absence by the general maritime law. And in Williams *v.* Dorr, 3 Mason R. 160, Judge Story explains how limited is the jurisdiction in this court in cases of set-off, as compared with law courts generally.

It is quite true the libellants have averred that they are interested, and have a property in the cargo. But that did not necessarily make them parties to the contract in the bill of lading, unless and until, by some act they adopted it.

In this case the first clear and undeniable identification of themselves with the contract was when they filed their libel in this court. The receipts of the three hogsheads of sugar and the syrup, upon high authority is no more than evidence for a jury of the party having undertaken to pay for that part. They would have a right

to demand and receive the cargo as consignees, although they were not owners. It is to those who claim as consignees that the master must have regard. So high is the obligation of the master to keep for his consignee if named, that a surrender of the property to judicial process, if he could have avoided it, will not excuse him. Olcott's R. 498.

It cannot be said that the communications, verbal and written, between the parties, were sufficient to connect the libellants with the contract of affreightment. It would certainly not be so, if they were merely consignees; for as such there is nothing upon which the master could maintain an action against them, unless for the small part they received. If the fact of ownership does make a difference it is sufficient to say, that a knowledge of them in any other relation than that of mere consignees, is not brought home to the master.

It has been farther urged that as the consignees had a right to discount damages to the cargo against the freight, they had a right to inspect it. And that to make this inspection perfect, they had a right to exercise it when the whole cargo was ready to be delivered; that a part of the duty of the captain was to notify the consignees of the cargo being ready; and until this was done, and a right and true delivery ready to be made, he had no claim for freight, and therefore no lien. It will be proper for me, in another place, to say a few words in relation to these propositions which are the predicates of this conclusion. But at this time I will only say that considered as the antecedents to a personal action against the owner or consignee, and even in regard to the legality of a detention under a lien, they may with explanations be admitted. But the same circumstances which must precede the action against the consignee, are not necessarily to precede the lien of the carrier. Generally speaking and under the usual bills of lading, without any other agreement, no action, as has been seen, can be maintained against the consignee until delivery; because delivery is the conclusive evidence of acceptance, and acceptance in such case, creates the privity of contract under the bill of lading between the master and the consignee. If all the circumstances which are necessary to precede the obligation of the consignee, were also necessary for the lien, the consequence would be that the lien may be destroyed at the same time in which it arose. And when we examine the various circumstances which are brought to our notice as things to be done by the master, it is necessary to inquire whether they are cases in which a personal action against the consignee is in question, or a remedy *in rem.* For the lien of the master does not arise from the bill of lading or charter-party, but exists without either; is often waived or construed to be so, by their terms; and not unfrequently controls both. The lien is favored in law, and ought not to be displaced without a clear and determinate abandonment of it. 2 Sumner R. 603.

Originally, the maritime lien was unaffected by any other con-

sideration than that of having performed the voyage. Roccus lays it down that freight may be recovered by a summary suit, and the shipper is not allowed to be heard in alleging damage; he must pay the freight instanter; and security will be given to him to refund, if his objections, on a rehearing, can be found valid. (Roccus, Note 87.) It is true that with the tendency in courts to avoid circuity of action, and save the expenses and delays incident to enlarged litigation, Courts of Admiralty will make up an account between parties; consider those things which grow out of the same transaction; and set them off. But this, though useful, is in truth, an innovation; for the practice of making up an account is very far from being an original feature in its jurisdiction. Indeed as an independent mode of relief, perhaps it could not be maintained. 11 Peters' R. 175; 2 Curtis R. 84. In affreightments the master has his lien on the cargo for the freight; the consignee or owner, his lien on the vessel for the damage or non-delivery of his cargo. From the earliest times the necessity for these liens has been recognized. From an early day also in various parts of the commercial world, regulations have been adopted by which these liens are enforced. In the United States they are committed to courts exercising the jurisdiction which belongs to this.

It seems to me that the circumstances which have been urged, as showing that there was no lien, are rather in a proper case, to be relied on, in support of the opinion of its having been destroyed. For if these are to exist, to entitle the party to his lien; then upon them would depend the question, how and when the lien would arise. But the lien commences with the lading of the cargo; continues during the voyage; and is of force when the vessel arrives and before unlivery is made. A failure to deliver, or other good cause, may be held to destroy the lien, because they may destroy the debt to which the lien is accessory. But they do not by their performance give rise to it.

In the argument great stress was also laid on the right of the consignee to an inspection of the cargo. The weight of the argument upon this point is only lessened, when it is made as directly affecting the lien, by being a circumstance which precedes, and gives it vitality. It is at once seen that this is not so, because the lien is in operation before the time when the right to inspect exists. But the right of the shipper to inspect, is so consistent with reason; so clear in the maritime law; and so well established by repeated adjudications, that it cannot be questioned. In the case of McCready, Motte & Co. *vs.* Holmes, decided in this court (Am. Law Register, Feb. '58), I have expressed what I consider is the law upon that subject. That, however, was an action *in personam;* where the consignee was in possession of the cargo.

It is the duty of the carrier when he has arrived at his port of destination, to give notice of the fact; and when he is ready to deliver, if his contract does not require a delivery specially to some

person or place, to notify consignees of the time and place. If the carrier desires to retain his lien, but is willing to deliver; and if the consignee is willing to undertake the liability which arises from becoming a party to the contract by acceptance under the bill of lading; it is easy to make such arrangements as may preserve to each his proper rights. A qualified delivery on the one side, and acceptance on the other, will save all rights. But if the owner intends to retain his possession to secure his lien; and if the shipper declines to accept the goods until they are examined; then it is the duty of the owner to land the goods at such time and place as will afford every reasonable opportunity for inspection and safe removal. When the lien is to be preserved, and the parties cannot agree, delivery and payment must at least be concomitant. When the lien is not insisted upon, it is usual to deliver, and afterwards receive payment.

Notice to the party named in the bill of lading appointed to receive the cargo, is indispensable. Not, however, because it gives the lien; but, because it is necessary to terminate the liability of the carrier. And the value of the lien is or may be affected in this, that loss or damage resulting from any neglect of his proper duty by the carrier, is chargeable to the vessel; and in the proportion in which it diminishes the freight, either by an account, or a cross libel for damage, it diminishes the value of the lien which secures the freight.

According to the testimony of James Salvo, as soon as he, as the agent of the libellants, asked for the sugars of libellants, he was notified that the lien of the carrier would not be waived. After some conversation between Mr. Enslow, a partner in the commercial house of Mordecai & Co., and the captain, Mr. Enslow told the witness, the captain being by at the time, that every hogshead of sugar, in perfect order, was to be rolled on one side and sent to the store; and to pay freight on those sent to the store, on the wharf. The witness sent three hogsheads of sugar and the syrup, which were in good order, to the store of Mordecai & Co., went to arrange them, and sent the drays back for more. No more sugar came by the drays. Witness then asked Mr. Hertz, also a party of Mordecai & Co., for money to pay the freight for the hogsheads he had taken. Mr. Hertz refused, and told him to tell the captain that he would be held responsible for all injuries resulting to the sugars from detention on the wharf. Forty or fifty hogsheads were on the wharf about this time. From the testimony of this witness, it is quite clear that by an express agreement made with the master, Mordecai & Co. were bound to pay on the wharf, the freight of sugars which they would select and send to the store. I have already said that, without such express promise, the law from the acceptance of the sugar would imply the same promise; but it would not imply a promise to pay for the whole cargo, from an acceptance of a part. It has not been urged, and therefore I will not consider, how far this agree-

ment substituted a mode of delivery for that resulting from the bill of lading.

The same day Mordecai & Co., in writing, said to the master that, upon the delivery of the sugar, they will pay freight; and if he refused to deliver according to the usages of the port, they will hold the vessel and owners liable for all damages. This offer, however, really amounts to nothing; unless, which is of course impossible, it could be relied on to show, that an offer to pay upon delivery of the cargo, was sufficient to destroy the lien of the carrier. The same day, and in reply, the captain informs Mordecai & Co. that the sugars are not ready for delivery, as many of the hogsheads require coopering; and whenever they are in the usual order, the captain says he will inform them. Still later in the same day, the captain informs them that the sugars are now in good order; that they will not be delivered without payment of freight; and that after sunset they will be stored at the expense and risk of Mordecai & Co. Yet later in the same day, Mordecai & Co. reply, that the preceding letter was handed to them after 2 o'clock P. M.; that they are prepared to give satisfactory security for the freight to be paid according to the usage of the port, and upon delivery of the property; that it is not possible for them to dray and store so many hogsheads as were on the wharf at so late an hour in the day. At half-past 7 P. M. in the evening of the same day, the proctors of Mordecai & Co. address a note to the captain, to inform him that the whole consignment of the sugars is at the risk of the vessel; and that Mordecai & Co. are ready to pay the freight upon the delivery of the whole consignment to them; that they have reason to believe the cargo damaged; they will give any security for the freight; but will not pay it as demanded, while a large portion of the cargo is in the possession of the master; and that they will libel the vessel the next morning, unless the matter is adjusted to their satisfaction.

I have very carefully considered these letters and all the evidence in the case, without being able to discover anything which makes the solution of this matter difficult. The opinion of either of these parties as to what the other should do, is of little consequence, while the rules of law applicable to this matter, are as clear as I take them to be. In his second letter of the 4th April, addressed to Mordecai & Co., the master informs them that their sugar is now in good order; that order which in a previous letter he told them, they must be put in before he could deliver. But it is said he was not in a condition to deliver at that time, because a part of the sugar was not landed until the 5th; and that Mordecai & Co. had a right to a perfect inspection of the whole, before they would bind themselves to take any. There would be something in the objection if Mordecai & Co., on the 4th or 5th, or any other day, went to inspect, and could not; either because the sugar was not landed, or landed, and in an improper place. But this they never did; the whole cargo was stored on the 5th; and no evidence is before me of Mordecai & Co. having at

any time gone to the master and requested or desired to inspect the cargo, and that they were unable to do so. In fact, no one can doubt, from all the evidence, that the right to inspect was not at that time a subject of dispute; for the cargo was looked at by various persons in and out of the hold of the vessel. Again, it is said, the cargo was damaged; and if damaged to as much or more than the freight, they had a right to take it, without freight; for if no freight was due, there was no lien. But this is upon the assumption that the rule in Ewarts *v.* Kerr is of force in this court. And it would be, if it affirmed an usage; but it is not of force, as has been seen, when it only declares the law merchant. For myself, I should regard the introduction of a rule by which the lien, and in that the legality of the detention, depend on the settlement of unliquidated damages, as of very doubtful propriety. It unsettles the law—I speak of this court; and this of itself is a grave objection to the introduction of a new rule. It disturbs the value of the lien; for if its rightful exercise depends upon a verdict, the same verdict which directly sets aside the lien, indirectly makes the previous detention a trespass. In addition to this, it adds nothing to the perfect protection which the shipper has in his lien on the vessel, or action against the owner or captain.

If the lateness of the hour at which the sugars were landed, prevented the consignees from removing them, with reasonable diligence; they would remain on the wharf at the risk of the vessel. If stored that night, the storage would be for the security of the vessel, not of the consignee, who could not be affected by such a delivery. But if the storage is rendered necessary to preserve the lien of the carrier for freight, then to a proper limit, it is at the expense of the owner. And that this is plainly so must be seen at once, when we remember that while the maritime law preserves the lien, it expressly provides that the cargo cannot be kept on board of ship until payment is made: hence the usage in England to send it to a public wharf, and order the wharfinger not to part with it until the freight and other charges are paid. The cargo is thus in the constructive possession of the master, his lien is continued, and the wharfinger is his agent. (Chitty on Carriers, 312.)

Now it will be observed that in the libel, the ground upon which the court is asked for its aid, is that the master had neglected and refused to deliver the consignment of sugars, although the libellants offered to pay freight upon the delivery of the same. There is no evidence of a tender of freight, and demand made for the consignment; there is no evidence of an offer to make the payment of freight and delivery of the consignment concomitant acts. But the impression appears to me to manifest itself, that delivery to the consignee must precede the right to demand the freight. Such I have already said is the rule in a personal action, when a mere consignee is in question; and the liability of the consignee depends upon his acceptance: but such is not the rule when the lien is

claimed; for that at the least requires that payment and delivery should be concomitant acts. It will be at once seen that with the view which I have taken of the case, and with the evidence confined to the single issue made in the pleadings, at the hearing of this case as first presented, I would have been inclined to dismiss the libel, unless a motion had been made to amend it, with new allegations.

But the case now before me is not the case as it stood when the pleadings were made up. By the mandate of the Supreme Court it is remanded to the Circuit Court, with directions to send it back to the District Court, in order that the District Court may proceed to a final decree upon such a report as the commissioner and clerk may make pursuant to the order made by the District Court. That order of the District Court was to ascertain the charges to be made against the respective parties to the suit; and to state the account between them, with liberty to use the testimony then before the court, and other evidence in relation to this point. The additional testimony taken under the order brings to view one instance of the unfortunate results consequent upon protracted litigation. It appears that on the 5th April, 1854, the master of the schooner Mary Eddy, the respondent in this case, stored with George W. Brown, the proprietor of Brown's wharf, 99 hogsheads of sugar, which with the three hogsheads and the syrup delivered to the clerk of Mordecai & Co., made up the whole consignment. The sugar was stored subject to the order of Captain Hinckley (the captain of the Mary Eddy) or his agent. By the report of the clerk and commissioner it appears that at the time when they were stored these sugars were worth $6,901 97, and the freight claimed was $641 40, showing a surplus of property over the demand it was held to secure of $7,260 57. The sugars were left in the stores subject as it now appears to the highest rates allowed by law, until the 21st November, 1855; when Mr. Brown to satisfy his storage bill, sold, without the consent of the libellants, 51 out of the 99 hogshead, for the net sum of $2,314 77. Out of which he retained for storage $1,919 91; and paid the surplus to the agents of this vessel. The balance of the sugar, 49 hogsheads, continued in the store of Mr. Brown until the 22d of January, 1856; when it was sold, by order of the agents of this vessel, *not, as I understand*, with the consent of the libellants. From this second sale, the agents of the vessel paid to Mr. Brown for storage the further sum of $204 84; making the whole expense for storage, $2,125 72: retained for freight and interest, $759 05: and tendered the libellants for their consignment, $2,400 10; which they refused to receive, and it is still in the possession of the agents of the master of the schooner Mary Eddy.

It is not necessary for me to look farther for the authority to discuss and decide the questions which arise at this point of the case, than the mandate of the Supreme Court directing the account to be made up. In the course of the argument, the libellants asked leave to amend: but I declined to entertain the motion, considering that

at this stage of the case, it belonged to the Circuit Court to decide that question. I have no right to inquire how far the pleadings raise that which is now the question in this case, for it arises irresistibly under the order, and is inseparable from the account. At the argument of the case I notified the proctors of both parties, that in making up an account, it would be necessary to consider, not only the question of the right to the lien; but also the extent of the lien; the duties it imposed; and the liabilities it involved.

A lien, says Judge Story, is not in strictness *a jus in re*, or *a jus ad rem;* but it is simply a right to possess and detain property, until some charge attaching to it is paid or discharged. (1 Eq. Jur., sec. 506.) The possession and exercise of the right of a lien implies a trust. (2 Eq. Jur., sec. 1215.) By the civil law, the creditor who has the pledge in his custody, has as his first engagement to take care of it. And not only will he be answerable for the losses and damages which he may have caused by his own act and deed; but he will be accountable, likewise, for what shall happen through any negligence, or fault, which a careful and circumspect person would not readily be guilty of. (Domat. P. 1, B. 3, T. 1, sect. 4.) In the Young Mechanic, 2 Curtis C. C. Rep. 404, Judge Curtis, after remarking what must have struck every one whose duties require him to consider it; "that though the nature of admiralty liens has doubtless long been understood, it does not seem to have been described with fulness or precision in England or this country;" enters upon an examination of it, and illustrates it in a manner well deserving attention. He distinguishes it from an equitable lien, which has been just defined; and adopts the definition by Pothier of an hypothecation, as an accurate description of a maritime lien under our law; "the right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price." In general, the maritine lien gives no right to the creditor to take possession; that is executed by the suit *in rem*. But the lien for freight is accompanied with the possession generally; and in England and the United States, is a lien at common law as well as of the maritime law. Possession is essential to its enforcement as a lien at common law, but not in the maritime law. The absence of possession is indeed evidence of a waiver. But if that is repelled, a proceeding *in rem*, operates as the seizure of the thing, and ends in the judicial sale.

Like all securities of the maritime law, whether privileges or liens, it is of great and commanding necessity. It is given because it is supposed to be essential to commerce in the protection it affords. Its object is to secure the payment of the freight. (Fland. Ship, 281.) And the master may detain all or any part of the merchandise for the freight, of that consigned, to the same person. (Ib. 282.) We now see the power; and the purpose for which it is given. The mode in any case, in which the power is to be exercised,

must be referred to its tendency to accomplish the result for which the power was given; that test enables us to decide how far the mode is proper. Does the power to detain involve that of indefinite detention, or for any time that the master of the vessel may please? The answer seems to me to be involved in another; is it necessary for the purpose which the law intends, in giving the power, and consistent with the nature and use of the thing on which it operates, that it should be indefinite? If the end is to procure payment of the freight, the shortest detention consistent with that result would seem proper. But it may be said, how is the master to sell? I confess that I am not prepared to say that in the case of a maritime lien like this, one of the few where the creditor is in possession, there is in him a power to sell; unless the property is perishable, or manifest injury results from the detention: or in other words, a case of necessity. In this case it is not necessary to decide the general question of the right of the master to sell, because the cargo was subject to deterioration: and that would authorize the master to sell, whenever he was forced to act as agent of the owners. But it has been held that in all cases of detention for freight, a sale of so much as may be necessary for the payment of it, is proper. 2 Boul: Paty 472-475. And in case of the refusal of a consignee to receive, the master may sell by the authority of the proper magistrate. Valin L. 1, T. 1, art. 17. The safe rule undoubtedly would be, to refer the question of the sale to judicial authority if it could be invoked. In this case, however, the master cannot find shelter behind the want of power to sell, in order that he may realize his freight, for that power he has exercised. And if he has asserted it after the property has been consumed to the extent of more than a third of its value in storage, it is difficult to understand why he did not exercise the same power without unreasonable delay; and without the great sacrifice of property which has been made. Was it his duty to make sale of the property? It was unquestionably his duty to use his security, so that in yielding him his freight, it would involve no unnecessary damage to the consignee or owner. In some parts of the maritime law, it is expressly enjoined on the captain, when he thus detains, to take care that the cargo is not spoiled or diminished. Or'd. Rott. art. 157, Chitty 312. But if there is no power by law in the master to sell, could he, by an application to this court, have obtained an order for the sale? Clearly so. Even if he was out of possession, and had a lien; this court would seize the property and order a sale. Nor can it be said that it would not order a sale, when the fact of his lien was beyond dispute, by the fact of his possession. The Spartan. Ware's R. 154.

It is true, that in behalf of the respondent, an application was made in June, 1855, for leave of the court to sell. But the leave was not asked to sell to pay freight, and to pay the balance to Mordecai & Co.; or to sell as much as was necessary to pay freight;

but to sell in order that the storage account might be paid; and because the goods were perishable. The property was not brought into court, even under that petition; because the liability for storage was a charge which the court was not asked to decide; which indeed it could not decide, while the owner of the store was not before it; and could not be brought before it. The application, of course, was refused. At that time, the circumstances were already in operation, which are now before me; making the relation of the parties towards each other, very different from what it was when these proceedings were commenced.

It may be said that Mordecai & Co. might have caused the sugars to be sold. It may be so; without inquiring into the mode, by which they could have done it; concede it to be so. But although it would have been a happy thing for all parties if it had been done, yet Mordecai & Co. were under no obligation to interfere. They had a right to say to the respondents, you are exercising the power of the law: be careful lest you exceed its authority.

It is inconsistent with the nature of any maritime lien that it should remain dormant and unproductive. In all cases where the party is out of possession, and its enforcement has been delayed beyond a reasonable time, a presumption of waiver is supported. The object for which the lien is given seems to require that it should, with reasonable quickness be made to effect its purpose; which is to secure the payment of the debt. I will not say that under any rule of the maritime law, a master in possession must dispose of the property within the same time; in which, if not in possession he will be held to have waived his lien. But I am quite prepared to say, that when considered as a maritime lien, there is a period, perhaps properly to be determined by circumstances, within which he must exercise his right. Its purpose is never accomplished by it, whilst its exercise is confined to mere detention.

In Kellum *v.* Emerson, 2 Curtis C. C. R. 82, it is said, "A court of Admiralty applies the principles of equity to the subjects within its jurisdiction." And this is recognized in all Courts of Admiralty, and is supported by the highest authorities. What then is the rule which in equity is enforced against a creditor who holds the property of his debtor in possession as security? Clearly one which enjoins on the creditor, the exercise of all means within his control, by which the interests of the debtor may be preserved as far as possible, consistently with the rights of the creditor. What were the means which the creditor in this case had at his command, so far as the sale was concerned? I think he had two. First a power to sell in a case of necessity, where the goods were perishable, or subject to deterioration. Judge Story certainly holds a sale by the master justifiable, in case of necessity. (The Cassius, 2 Story, 97.) But was a sale by the master the only remedy? I think, that of the case in all its relations, this court had jurisdiction; which it could exercise whenever the case was committed to it; but the exercise of

that jurisdiction was never allowed by the master of the vessel. The power of the court to order a sale in all cases where goods are arrested, if they are perishable, or liable to deterioration, decay, or injury by being detained in custody, pending the suit, is expressly given. (Rule 10.) But the property here never was placed under the control of the court. Is the master liable for the consequences resulting from not doing so? We have to consider what it was proper for him to seek to do; and what the court would have done, or will do, in such cases.

The court could not refuse his application to obtain its decree for a sale of the property and a payment of his freight, when he would surrender to it the property on which his lien attached. Such is the course in a great number of salvage cases, in all cases of derelicts, and in cases of material men in the home port of the vessel, who are in possession. And it can scarcely be supposed that the property would have been kept by the court for so long a time without sale; because there are few kinds of property which could be so kept without undergoing deterioration or becoming subject to decay or injury; and it is the duty of the court, and for this end it is clothed with power, to preserve property pending litigation. But further: the claimant appearing upon a proper stipulation, the court could deliver the property, and preserve the rights of the master. Was then the property of the consignees, these 99 hogsheads of sugar, perishable, or liable to deterioration, decay, or injury? Mr. Tobias, who sold the last parcel, testifies that the casks had been wet, he believes from salt water; they had been dried; some were half empty; the sugar had caked in the hogsheads. Other witnesses testify that they were sold as damaged. And it may be assumed as a fact, that they were then damaged. But if then damaged, in what way and what extent were they damaged? There is no satisfactory evidence before me as to either of these facts. They must either have been damaged when first put in store, or damaged while in store. And in either case the party having the control of them under the general rule, is answerable to the person to whom they belonged. If the deterioration was the result of damage done to the sugar before the time when they were stored, then the longer the detention the greater the deterioration, and the more marked is the departure from the rule which should have governed the master. But it appears that subsequent to the time when these sugars were stored a severe gale occurred, in which it is supposed that the sugars were wet. Water marks were seen in the store in which they were kept; but no positive evidence is produced that they were damaged at that time. It is probable that to some extent they were damaged at that time; and if so, the master is liable to libellants.

I have said that in stating an account between the parties the master must be affected with all the consequences resulting from that use of his lien, which was either not legal, or not necessary and causing damage; and in this I include the commission of what was

wrong and the omission of what was right. I think that his detention of the sugars, if he had power to sell, was an improper use of his lien; because unnecessary for the purpose for which the lien was given, and greatly to the detriment of the owner. And that if he had not the power to sell, but by an application to this court or any other could have got that power; neglecting to do so, while retaining the control of goods undergoing deterioration, will make him liable to the consequences.

I am bound to say that I think both parties to this cause have mistaken the just measure of the rights which the law confers. I have in the first part of this opinion indicated in what I thought the libellant was in error. In that part of the case which I am now considering I have explained in what the error of the respondent consisted. It is evident that on both sides there was a proclivity to an extreme estimate of their rights, from the occurrence previously of some matter between them which was unpleasant. I have said that in the detention of the cargo to secure the lien of his freight the master exercised a lawful right. I think in continuing the exercise of that detention upon property undergoing deterioration, without submitting the property to such control as could rightfully dispose of it, if he was not satisfied that under the circumstances he could not do so himself, he acted wrongfully and is liable to the consequences. And all the evidence which is before me in relation to the conduct of the master while detaining the property supports me in the conclusion that the respondent should be made liable. I pass over the fact that with property capable of division, and of which he had the right to retain a part for the freight of the whole, he insisted on retaining the whole. And that in so doing he retained an amount ten times greater than his claim, and subjected the owner to ten times the expense that was necessary. I pass this over, because in speaking of the power to retain the language is general. But when the master in the exercise of his right did detain, it was nevertheless the property of another which he had in his possession. That possession he transfers to another—the owner of the store in which he placed the property. And it was there placed subject to the order of Captain Hinckley or his agent. There was no recognition of any other owner, nor discretion allowed the storekeeper to deliver the property to any person but Captain Hinckley or his agent. Now, it is quite clear that the right which the carrier was entitled to was simply that of detention until freight was paid. And the importance of the mode in which the goods were stored is only made to appear from subsequent events. When Mr. Brown, in whose stores the sugars had been been placed, was about to sell to pay his storage, Mordecai & Co. applied to him to permit them with some two gentlemen to examine into their condition. Mr. Brown acceded to their wish, but subsequently informed Mordecai & Co. that Messrs. T. S. & T. G. Budd, the agents of the schooner Mary Eddy, objected to an ex parte survey, and directed him to refer

Mordecai & Co. to them or their counsel. Mordecai & Co. then address through their proctors the same request to the proctor of the master of the vessel, and the reply is that before it can be consented to, it is but fair that they should be advised of its purpose and of the use that may be intended to be made of it hereafter. Of course the terms were not submitted to, and the inspection was not allowed. So when the sugars were stored, or soon after, Mordecai & Co. informed the agents of the master of the Mary Eddy that storage could be procured by them at the rate of 25 cents per hogshead per month, and they replied that the owner of the store in which it was would make the rate agreeable to Mordecai & Co. But subsequently when the owner of the store demanded storage at the rate of 25 cents per week for each hogshead, instead of 25 cents per month, there was no interference on the part of the agents, no evidence of any agreement or understanding as to a lesser rate; although the witnesses testified that they would not have stored their property at that rate or without a special agreement. It is quite obvious that it was forgotten that when the master retains the control of the cargo to secure his lien for freight, he is regarded as the agent of the owners of the cargo, and that the conduct of the master in the management of the property in this case was inconsistent with the duties which the law in such cases devolves upon him.

In relation to the account, I am quite satisfied that the true rule of ascertaining the amount for which the carrier is responsible in cases of non-delivery, is the market price of the goods at the port of delivery with interest. In other respects the report must be modified. Let the report as it has done, set out the value of the property at the port of delivery; from this amount let the freight be deducted; and let a farther deduction be made for the storage of the goods for sixty days; which, under the circumstances of the case, I consider a reasonable time for the master, to make application for the aid of the court, in making his lien available: the balance then remaining with interest from that date, will be the amount due the libellants. As to the costs, I will divide them in the following manner. I do not sustain the libellants in what they did previous to the storage of the goods and the filing of their libel. I do not sustain what the respondents have subsequently done. All costs incurred up to the hearing of the case by Judge Gilchrist will be paid by the libellants; and all which have been subsequently incurred will be paid by the respondents.

The clerk and commissioner will without delay amend his report according to these directions; and upon the coming in of the same, a decree will be signed. A. G. MAGRATH.

March 18, 1858.

Decree.

This cause came up to be heard on the report of the clerk and commissioner under the order of this court, made at the hearing

thereof; the exceptions filed by the libellants and the respondent; and on the amended report of the clerk and commissioner in pursuance of the order made at this hearing; and the exceptions of the libellants and respondents, also filed. And upon due consideration of the same, and of the evidence submitted, and after argument by the several proctors, it is now ordered, adjudged, and decreed, that the exceptions be overruled, and the amended report of the clerk and commissioner be confirmed. It is further ordered and decreed, that the libellants recover against the respondents six thousand one hundred and eighty-six dollars thirty-two cents, with interest from the 16th July, 1854; and that the libellants and respondents severally pay the costs reported by the clerk and commissioner as by them respectively due, under the order of this court, directing a division of the costs between them. It is further ordered that the stipulators in this case pay into court the amount of their stipulation, or so much thereof as may be necessary to pay and satisfy the libellants the amount ordered and decreed to be paid to them, and the costs ordered and decreed to be paid by the respondents, within thirty days after notice of this decree. And in default thereof, that the libellants may move that summary judgment be ordered against the stipulators, and that execution issue thereon.

A. G. MAGRATH.

24 March, 1858.

Which said decree of the said District Court is, as your petitioner is advised, erroneous, and ought to be reversed; that your petitioner therefore humbly appeals from the said decree, and prays that the same may be reversed, and that the libellants' libel may be dismissed with costs, and your petitioner may be restored to all things which he has lost by said decree; and your petitioner prays that he may be permitted to introduce new and additional evidence in the said cause, when the same comes up to be heard before your honor.

And your petitioner, as in duty bound, will ever pray, &c.

E. DeTREVILLE,
Appellants' Proctor.

At a Reference.

Present—Mr. Porter, and Mr. McCrady, and Mr. E. DeTreville.

Monday, 16th November, 1857.

T. J. Tobias, sworn. He knows these sugars in dispute, insomuch as he sold 49 hogsheads of the sugar. (Mr. DeTreville excepts to any testimony being taken as to matters arising subsequent to the decree of the District Court.) Witness sold these 49 hogsheads on 22d January, 1856. They were on Brown's Wharf; thinks they were turned out of store in order to be sold. The casks had been wet (he believes from salt water). They had then dried. Some of them were half empty, as shown by the weight. The sugar had caked in the hogsheads. The net weight (aggregate), 33,365 pounds;

3 hogsheads sold at 9⅝ cents per lb.; 8 hogsheads at 9½; 38 hogsheads at 9¼ per lb.

Sugar had increased in value very much since 1854. This sugar was sold *as damaged.* From the time of this sale to September last, sugars had been going up. Sugars had gone up fully 100 per cent. from 1854 to last spring (1857).

This sale was made by order of Messrs. Budd, on account of all concerned, and proceeds paid to Messrs. Budd on 24th January, 1856.

Cross-examined—In reply. These sugars were stored on Brown's Wharf, and in a store under the office now occupied by Mr. Street.

T. J. TOBIAS.

Sworn to 16th November, 1857.

H. Y. GRAY, District Clerk.

J. S. Cohen, sworn. Saw the sugars in dispute; saw them when they were stored on Brown's Wharf, in a store under the office occupied by H. T. Street. His attention was drawn to them the day they were advertised for sale as damaged. They were stored in the last building on south side of the old Vendue Range. The east side of this store was exposed to the water. There was no building between it and the water. The sugars had the appearance of being damaged, and when the casks were rolled you could hear the lumps rattling, showing that it had caked.

He saw these sugars in 1854. One quality then was worth 7 cents, and the other 6½. Sugars have advanced much since then. The sugar then worth 7 cents have been sold as high as 13 or 13½ cents.

Cross-examined.

At the time of the sale by Mr. Tobias, he saw them and thought them damaged. He thought they sold at a high figure.

In reply. Another part of these sugars previously sold by Taylor were also damaged.

J. S. COHEN.

Sworn—

H. Y. GRAY, District Clerk.

H. T. Street, sworn. Is one of the proprietors of Brown & Co.'s wharf. He is a wharfinger. The store under my office—having heard that water had been in the store, he had the floor raised two feet. He stores sugar there. The wharf rates allow us to charge 23 cents per hogshead per week. The lowest he ever stored sugar for was 12½ cents per hogshead per week. If sugar were stored from a vessel without agreement, he would charge 23 cents per week. He never had a lot of sugar stored without an agreement. As a merchant, he has stored sugars; he never had paid less than 37½ cents per month; has known it to be stored as low as 25 cents per month. As a merchant, he would not store goods for a long time without making a bargain, but if consignee of a vessel, he would

have goods not called for stored by the wharfinger without any agreement.

Cross-examined.

He has come into possession of Brown's wharf about 18 months. He had the floor of the store raised above where he saw the water mark. He once had goods, saved from a wrecked vessel, stored there, before he came into possession; they were put in there by the wharf. If the parties refused to take goods, he would have them stored by the wharfinger without agreement. He, in his store, would charge 23 cents per week. It would be a thundering high price, but he would charge it, because allowed it by law. The water marks he saw in the store were the effect of the gale of 1854. He had been told by the wharf owners that it had been overflowed in that gale, and he did not consider it afterwards a safe store.

HENRY T. STREET.

Sworn to 16th November, 1857.
H. Y. GRAY, District Clerk.

Otis Mills, sworn. Is a wharf owner; has stored a good many sugars; we usually make contracts; the rates vary with the seasons; he thinks 40 cents per month the lowest rates, and 50 cents per month the highest. In 1854 our wharf was higher than Brown's, though then in the gale we had some damage. We had to move some cotton during the gale; it was early in the morning (Sunday) they moved; the gale was severe two days and three nights. Some of the cotton on his wharf was damaged. He bore the loss on them, and paid the damage, having written to the parties and they not taking any notice.

Cross-examined.

He never makes bargains for the storing of goods left from a ship. We charge the regular legal rates. It was a very violent gale. The floor of our lowest stores were overflowed about eight inches.

In reply. In case of 100 hogsheads of sugar, about which there was a dispute, and he were consignee either of the ship or the goods, he would not have them stored without an agreement with the storer as to the rates.

O. MILLS.

Sworn to 16th November, 1857.
H. Y. GRAY, District Clerk.

Henry Cobia, sworn. Is a large dealer in sugar (wholesale). The rates of storage differ; if sugar stays in store two or three months, we charge 37½ cents per month; if it stayed eight, ten or twelve months, we would charge 25 cents per month. This is the charge as commission merchants. As we have our own warehouses, we store nowhere else. Don't know the rates in other stores. He thinks 23 cents per week for a lot of hogsheads of sugar, stored two years, a very exorbitant charge. He has bills with Brown's wharf, and he

allows the wharves the usual rates of wharfage, and they, on their 6 months' bills with him, allow a discount of 25 per cent.

Cross-examined.

Our stores are private. Molasses has been stored with him, but never without a bargain. He is entitled to a discount of 25 per cent. from the wharves, on account of the business he brings them. Our store did not suffer in that gale. We are on the north side of the Vendue, and near the Bay-street. HENRY COBIA.

Sworn to 16th November, 1857.

H. Y. GRAY, District Clerk.

J. H. Taylor, sworn. He sold some of these sugars by order of Brown. They were damaged sugars. JAMES H. TAYLOR.

Sworn to.

H. Y. GRAY, District Clerk.

Thos. J. Kerr, sworn. Is owner of Kerr's wharf; remembers the storm of 1854; has had sugar stored on his wharf since that time, and probably before then. During last September, when it looked like a gale, he gave notice to the parties, that the goods if kept there would be at their own risk. And they had them removed. His object was to avoid the responsibility. He knows the store under Mr. Street's present office; as it stood then the floor of the stores were rather low; but have been raised since, the gale having proved them to be too low. The severity of the gale lasted one night and part of two days. The rates of storage of sugars varies; we have charged from twenty-five to forty cents per month; the printed rates are much higher, and are per week; the customary rates are from twenty-five to forty cents per month. Has been wharfinger and wharf owner some thirty years.

Cross-examined.

Has never given that notice to parties to remove before last September, as he is only recently a wharf owner. Previous to the gale of 1854, it did not occur to him that the floor of the stores on Brown's wharf were too low.

In reply. Has never known such a charge as twenty-three cents per week for one hundred hogsheads for a long time. He thinks the printed rates apply only to small lots and for a short time.

Sworn. T. J. KERR.

H. Y. GRAY, District Clerk.

James Salvo, sworn. Has had conversation with Captain Budd, senior of the house, regarding the storage of the sugar. Was and is the clerk of Mr. Mordecai's house. He went to inform him that we could have the sugars stored at twenty-five cents per month. He said the sugars had to be stored, and they were stored on Brown's wharf; and Col. Brown had told him that he would make it satisfactory to all parties.

Cross-examined.

This conversation took place on the 31st August, 1857; didn't tell him (Mr. Budd) what wharf they could be stored at for twenty-five cents per month.

In reply. He knows they could have been stored at that price.

Sworn to November 16, 1857. JAMES SALVO.

H. Y. GRAY, District Clerk.

On motion of Messrs. McCrady & Proctor, proctors for Mordecai & Co., and on examination of witness, James Salvo, before the court,

It is ordered that the last date of 31st August, 1857, be altered to 31st August, 1854. H. Y. GRAY, Clerk.

Clerk's Report. Filed 10th March, 1858.

To the Honorable A. G. Magrath, Judge of the United States, &c.

The clerk begs leave to report, in obedience to an order of the Circuit Court, founded on the mandate of the Supreme Court, ordering that this case be remanded to the District Court, in order that said District Court may proceed with the said case to a final decree, upon such report as the commissioner and clerk may make pursuant to the order of the said District Court.

The order of the District Court, under which I am proceeding, is in these words: "Mr. Gray, the commissioner and clerk, will ascertain the charges to be made against the respective parties to this suit, and state the account between them. For this purpose he is authorized to use the testimony already reported, and such further evidence as may be brought before him in relation to this point."

Some testimony has been taken by me in this case, since the order of the Circuit Court last referring it back to me.

This testimony mainly referred to the storage of the sugars, to some damage to them from a storm, while in store, to sales of them at auction, a part sold to pay Brown's storage bill, and the balance by order of Budd & Co., with consent of Mordecai & Co.

I did not consider this testimony as relevant to the matters referred to me, as it related to circumstances which transpired long after the decree of the District Court. I have therefore made up the account upon the evidence and papers before the District Court, on the hearing below. I, however, herewith report the testimony above referred to (subject to the exception taken by respondent's proctors).

From the testimony taken in the District Court, it appears that the consignment to Messrs. Mordecai & Co., by the schooner Mary Eddy, on the voyage in question, consisted of one hundred and two hogsheads of sugar and twenty-one barrels of syrup, and that out of these only three hogsheads of sugar and the twenty-one barrels of syrup came into the possession of Messrs. Mordecai & Co.

It appears from the testimony of Mr. J. S. Cohen, that sugars

of this character would lose not more than three pounds per hogshead by drainage; and they consisted of two qualities, one lot marked Velesco, of nineteen hogsheads, worth at the time of their unlading in Charleston 7 cents per pound, and the other lot marked A, of eighty hogsheads, worth 6½ cents per pound.

The lot of Velesco, weighed thus, as per invoice:—

Velesco A 16 Hhds. weighed, .	16,349 lbs.	
do B 6 do do . .	6,341 "	
	22,690 "	
Less 3 hogsheads delivered, weighed,	3,325 "	
	19,365 "	
Less drainage 3 lbs. *a* 19 hogsheads,	57 "	
	19,308 "	
	7 cents.	
	$1,351.56	$1,351.56
The 10 hogsheads marked A weighed,	85,631 lbs.	
Drainage 3 lbs. per hogshead, .	240 "	
	85,391	
	6½ cents.	
	$5,550.41	$5,550.41
		$6,901.97

Dr.

It appears that freight is due, as per Bill of lading 102 hhds. *a*	$6—$612	
21 Bbls. Syrup, *a* $1.40 per bbl.	29.40	
	641.40	641.40
		$6,260.57

Six thousand two hundred and sixty 57-100 dollars, amount stated to be due to Mordecai & Co., under the decree of the District Court.

All which is respectfully reported.

H. Y. GRAY, District Clerk.

Clerk's Report—Filed 24th March, 1858.

To the honorable A. G. Magrath, Judge of the United States, &c. The clerk begs leave respectfully to report in obedience to the

directions of this honorable court, issued in the decree bearing date the 22d March, instant.

First he reports, as previously, the value of the sugars in Charleston at the time of their unlading to have been, ...	$6,901.97
From which deduct freight, ...	641.40
	$6,260.57
Deduct storage of 99 hogsheads for 60 days *a* 37½ cts. per month, for each	74.25
	$6,186.32

Add interest on this amount from 16th July, 1854.

The amount of costs charged against the libellants, up to the time of Judge Gilchrist's decree, is one hundred and eighty-two 15-100 dollars.

And the amount of costs taxed against the respondents, from aforesaid date, to the date of this decree, is four hundred and sixteen 11-100.

Respectfully reported.

H. Y. GRAY, District Clerk.

Respondent's Exceptions to Clerk's Report.

The respondent excepts to the several reports of the clerk and commissioner made in this cause:—

1st. In this: Because the respondent, having a lien on the sugars for the freight, and being entitled to retain the same until payment of freight, is not liable for the expenses and charges necessarily incident to the detention, and non-delivery of the said sugars.

2d. In this: Because the respondent, being entitled to freight, was entitled to interest on the same from the time of the landing of the schooner in Charleston, to the time of the sale of the residue of the sugars by Tobias & Sons, made with the consent, and at the instance of the libellants; and also to the usual primage and average.

3d. In this: Because the conduct of the libellants, in refusing to pay freight, rendered the use of a warehouse absolutely necessary, as well for the preservation of the lien, as for the preservation of the sugars: and the expenses, therefore, incurred in storing and keeping the sugars, should fall only on the libellants.

4th. In this: Because no deduction is made, in the account, for the evaporation, drainage, and internal decay of the sugars while in the warehouse; and because no estimate is taken of the damage, which, it is testified, befell the sugars by an act of God.

5th. In this: Because the clerk, in making up his report, exceeded the limits prescribed in the order of Judge Gilchrist, and the terms upon which the cause was remanded to the District Court; and has

predicated his report of matters, and points not embraced within the scope of the original proceeding, and has thus presented additional and new subjects of controversy.

6th. In this: Because all the costs of the cause are properly chargeable to the libellants.

E. DeTREVILLE, Respondent's Proctor.

(Filed 24th March, 1858.)

In the progress of this cause, the following applications were made to the court for an order to sell the sugars, and were severally refused:—

To the Honorable R. B. Gilchrist, Judge of the District Court of the United States, for the District of South Carolina:—

The petition of Jacob W. Hinckley, master of the schooner May Eddy, for W. & N. Lindsay, owners of the said schooner:

Respectfully showeth, That your petitioner, in order to preserve the lien of the said schooner May Eddy for freight due on a consignment of sugars to the said Mordecai & Co. (the libellants in the above entitled cause), did, on the 4th and 5th days of April, A. D. 1854, retain in his custody ninety-nine hogsheads of the said sugars, and did deposit the same in store at the expense and risk of the said Mordecai & Co. That the said sugars, so detained, are in a perishable condition, and chargeable with storage, and cannot be longer preserved without damage and great expense. That the progress of deterioration, and the daily accumulating expense of storage, must soon render the lien of your petitioner unavailable, and deprive him of the only security he has for the payment of the freight aforesaid.

Your petitioner, therefore, prays, that your honor will order the said sugars, in the custody of your petitioner, to be sold, and out of the nett proceeds arising from the sale thereof, the amount due for storage be paid, and that the surplus of said proceeds be brought into the registry of this court to abide the event of the appeal now pending in the above entitled cause, or to be there kept for the use of the persons who shall be entitled thereto. And your petitioner will ever pray, &c.

E. DeTREVILLE, for Petitioner.

(Filed 16th June, 1855.)

Personally appeared before me, Thomas S. Budd, and Thomas G. Budd, who swear, that they know and believe the matters and things set forth in the foregoing petition to be true.

THOS. S. BUDD,
T. G. BUDD,
Consignees of sch. "Mary Eddy," and agents for Capt. Hinckley.

Sworn to before me, this 16th June, 1855.

E. DeTREVILLE, Not. Pub.

On hearing the petition in this case, and on motion of E. DeTreville, proctor for Jacob W. Hinckley, it is ordered, that Mordecai &

Co., the libellants, do show cause on next Wednesday, the 20th inst., at 11 o'clock A. M., why the sugars mentioned in the said petition should not be sold, and out of the nett proceeds arising from the sale thereof, the amount of storage due thereon should not be paid, and the surplus of the said proceeds should not be brought into the registry of this court to abide the event of the appeal now pending in the above entitled cause, or to be there kept for the use of the persons who shall be entitled thereto.

R. B. GILCHRIST, D. J.

At Chambers, 16th June, 1855.

I do hereby certify to the Hon. Judge Gilchrist, that I have served a true copy of the above rule upon Messrs. Mordecai & Co., personally. THOS. D. CONDY, U. S. Marshal.

18th June, 1855.

The United States of America, So. Ca. District.

The petition of Thomas S. Budd and Thomas G. Budd respectfully sheweth:—

That heretofore, to wit, on or about the 4th day of April, 1854, your petitioners, as the agents of the schooner Mary Eddy, stored on Brown's wharf ninety-nine hogsheads of sugars, consigned to M. C. Mordecai & Co., who refused to pay the freight, except on conditions which your petitioners refused. That thereupon, a libel was filed by the said Mordecai & Co. against the said schooner, and your petitioners procured the release of the schooner by entering into a stipulation to answer the decree. That such proceedings were had in the case that a decree was rendered in this court against the schooner, from which your petitioners appealed to the Circuit Court for this circuit, and the said decree on appeal was reversed in the Circuit Court, and the libellants have prayed an appeal to the Supreme Court.

Your petitioners further show: That the wharfingers have demanded the payment of storage, and given notice that in case of the failure of the parties to pay the storage, the said sugars will be sold at an early day, as by the notice served on your petitioners as well as on the libellants, a copy of which is hereto annexed, will more fully appear.

Your petitioners, therefore, pray that the said sugars may be sold, and the rent in arrear discharged, and that the residue of the sales be brought into court subject to the future order thereof.

And your petitioners will ever pray, &c.

E. DeTREVILLE, pro Petitioners.

(Filed 2d Nov., 1855.)

Charleston, Oct. 31st, 1855.

Messrs. T. S. & T. G. Budd, Agents of the sch'r Mary Eddy, and owners of 99 hhds. sugar.

Gentlemen: Please take notice, that if the storage and expenses

upon 99 hhds. of sugar due and owing to Brown's Wharf, stored on the 4th day of April, 1854, and now in store, be not paid on or before the 6th day of November next, I shall have the same advertised and sold, or so much thereof as will pay the amount of the bill herewith furnished you, with all expenses of the sale, &c.

Respectfully yours,
GEO. W. BROWN,
Owner and proprietor of Brown's Wharves.

Messrs. T. S. & T. G. Budd,
Agents of Schooner Mary Eddy, and owners.

1855. To Brown's Wharf.

Oct. 31.	To storage 99 hhds. sugar, landed from Sch. Mary Eddy, April 4th, 1854, 83 weeks, @ 23 cts. per hhd. per week,	$1889 91	
	To extra labor on same, storing and repiling same, Sep. '54,	30 00	$1919 91

George W. Brown, Esq.

Dear Sir: We have received your notice of 31st October, in relation to the sale of 99 hhds. of sugar from the "Mary Eddy."

We beg leave to say, that so far as we are concerned, we do not recognize your right to dispose of the sugars except with our consent, which we have already offered upon reasonable terms, and are still willing to give upon the same terms.

And further, that we protest against your bill, rendered for $1919 91, as beyond the reasonable and customary charges.

MORDECAI & CO.

Charleston, 2d November, 1855.

Brown's Wharf, June 19, 1855.

Messrs. Mordecai & Co.

Gentlemen: Your favor of to-day, requesting permission, with some two gentlemen, to examine as to the condition of 99 hhds. sugar, stored in the wharf store, and in litigation between you and the owners of the schooner Mary Eddy, has just been presented me, and I hasten to reply by saying that it will afford me much pleasure to give you and your friends the opportunity of examining the sugars. I will be gratified in attending you at any time you may see fit to call. I am, most respectfully, yours, &c.

GEO. W. BROWN.

Brown's Wharf, June 19th, 1855.

Messrs. Mordecai & Co.

Gentlemen: Since writing you to-day that I would exhibit the sugars of the schooner Mary Eddy, I have seen the agents, Messrs. T. S. & T. G. Budd, upon the subject, who object to my permitting

an ex parte survey, and have directed me to refer you to them or their counsel. I am, most respectfully, yours, &c.,

GEO. W. BROWN.

Dear Sir: Messrs. Mordecai & Co. have applied to Col. Brown for leave to examine into the condition of the sugars in the matter of the Mary Eddy, and after having granted leave, he subsequently informed them that the agents, the Messrs. Budd, object to his permitting an ex parte survey, and have directed him to refer them to the Messrs. Budd and their counsel.

We therefore renew to you, in behalf of Mordecai & Co., the application for leave to examine into the condition of the sugars by their own inspectors, and on their own behalf; and we beg to add, that this is only asking a privilege which the captain of the Eddy and his agents have had the opportunity of exercising for themselves ever since the sugars have been in store to their order.

Very respectfully,
BROWN & PORTER.

19th June, 1855.
E. DeTREVILLE, Esq.

Messrs. Brown & Porter.

Gentlemen: Your note of the 19th inst., in relation to the application of Messrs. Mordecai & Co., for leave to examine into the condition of the sugars by their own inspectors, has just reached me.

Before we can consent to such an examination, it is but fair that we should be advised of its purpose, and of the use that may be intended to be made of it hereafter. An ex-parte survey, or inspection of these sugars, has always been objected to by us; and now at this advanced stage of the controversy, when the matter has passed through two trials, and is now under the appeal of Messrs. Mordecai & Co., it is difficult to perceive the propriety of concession now. We can scarcely infer that the application is made with a view of settling the controversy. Very respectfully,

20th June, '55. E. DeTREVILLE.

Dear Sir: As Col. Brown has sold part of the sugar in this case to pay his storage, we propose that the residue of the sugar be sold, and that out of the proceeds your clients retain an amount sufficient to pay freight and expenses, and that the balance be paid over to Messrs. Mordecai & Co.; and that this be done without prejudice to the relations, or the rights of the parties in the above suit.

Respectfully,
BROWN & PORTER.

E. DeTREVILLE, Esq.
16th January, 1856.

Dear Sir: We beg to call your attention to our letter of 16th January, 1856. In that letter, it was proposed as Col. Brown had

sold part of the sugar, to pay his storage bill (to which Messrs. Mordecai & Co. objected as unreasonable), the residue of the sugar should be sold, and that out of proceeds your clients should retain an amount sufficient to pay freight and expenses, and that the balance should be paid over to Mordecai & Co., and that this should be done without prejudice to the relations or the rights of the parties in the above case.

The object of this communication, was to sell the remaining —— hogsheads of sugar, for the benefit of all parties, without committing the rights of any party by that act. The sugar has been sold, and the entire proceeds are in the hands of your clients. We beg leave to say that we understood the words "freight and expenses," to exclude the disputed matter of storage and to include nothing beyond freight, expenses of sale, and costs of suit incurred, and in this construction we have always understood you to concur.

You must see the injustice of requiring Messrs. Mordecai & Co. to lie out of this money, or to accept an account or sign a receipt which is calculated, if not intended, to commit them upon the subject of the storage and damage to the sugar.

We here say to you on behalf of Mordecai & Co., that they are ready to receive the proceeds of the sugar sold by consent after any reasonable deduction, for freight and expenses, which your clients may think proper to make; but that Messrs. M. & Co. do not thereby commit themselves to the propriety or amount of any charges for which such deductiou is made.

You will understand that M. & Co. do not object to the amount of deduction which may be made, because they do not intend to inquire into that matter; but we do claim that in good faith the balance should be paid over to them, according to our mutual understanding of the agreement in writing.

Messrs. M. & Co. will sign any receipt which will not have the effect of committing them to that, which it was expressly agreed between us, should not be affected by the sale.

Respectfully,

BROWN & PORTER.

Charleston, Feb. 14th, 1856.

E. D. TREVILLE, ESQ.

Messrs. Brown & Porter.

Gentlemen: I would have replied to your communication of the 14th inst. at an earlier date, had I not been prevented by pre-existing engagements. It appears that you are under a misapprehension of my construction of your letter of the 16th ult. It is proper, therefore, that I should at once set myself right.

If, by the term "expenses," I had understood you to exclude the storage *that had accrued on the residue* of the sugars, and to pay which Col. Brown *had made no sale*, it is barely possible that, in the order we gave for the delivery of the sugars to Mr. Tobias, we should

have committed ourselves to such storage as Col. Brown might claim to be *then* due. To say that Col. Brown's *second* bill for storage must have been intended to be excluded, because the proceeds of his sale greatly exceeded the amount of his *first* bill, and were more than enough to pay both bills, is to assume that we had been advised of Col. Brown's account sales, and of the excess in his hands. But this is not a fact; on the contrary, I had understood from Col. Brown himself that his sale would be limited to just so many hhds. as would cover his bill *due at the date of the sale.* And at the date of your letter (the 16th ult.), I reasonably presumed that Col. Brown would have a claim for further storage accruing upon the residue of the sugars, from the time of his sale to the time of their delivery to Mr. Tobias; and I necessarily inferred, that such a claim must be intended to be paid out of the proceeds of Mr. Tobias' sale, and be part of the "expenses."

Your letter of the 16th ult. commences by saying: "As Col. Brown has sold part of the sugars to pay his storage bill, we propose that the residue of the sugars be sold," &c. The "storage bill" referred to here, must mean the *first* storage bill (a copy of which, I understand, was served upon your clients in Col. Brown's notice of his intention to sell), and not such storage as had subsequently accrued, because no sale had yet been made by Col. Brown to pay this. Not until the sugars had been sold by Mr. Tobias, or, at least, not until we had given an order for their delivery, did we come to the knowledge that Col. Brown had an excess in his hands from his sale more than enough to pay his second storage bill. In order to have a settlement with Mr. Tobias, it became necessary for us first to have a settlement with Col. Brown, that we might ascertain what expenses we had to set against the proceeds of Mr. Tobias' sale. In this settlement with Col. Brown, we received from him his account sales, and a certain sum, which he had put to the credit of the sugars, being so much money over and above his two storage bills. After Mr. Tobias had paid over to us the proceeds of his sale, we proposed to account with Mr. Mordecai by crediting both the nett proceeds of Brown's sale, and Tobias' sale, and from this amount to deduct freight and the costs of court. On this occasion, I did not understand Mr. Mordecai to object to anything in the account, except the debit of costs—these, he contended, were not a part of the "expenses." You will remember that Mr. Mordecai and myself called upon you to have this point explained. You agreed with me that costs were intended to be included. But Mr. Mordecai being still dissatisfied, I surrendered the point. I mention this circumstance to bring to your mind the fact that you and I had not had any communication previous to this, on the meaning and construction of your letter of the 16th ult. After this question of costs had been disposed of, I proposed to settle with Mr. Mordecai upon the same statement as before, only leaving out the debit of costs of court. But Mr. Mordecai objected, and still objects to Brown's storage bill

being included in the "expenses." I subsequently made a tender to Mr. Mordecai, of $2,400 10, in specie, as the amount less the freight, and Brown's, and Tobias' several bills of expenses. This tender Mr. Mordecai refused to accept, and to this issue the business has been brought. You will perceive from all of this, that whether or not it was our duty to settle with Col. Brown, and to bring his account into our settlement with Mr. Mordecai, it was imposed upon us by *our* understanding of the word "expenses," in your letter of the 16th ult.; and that to give up this position now would be to prejudice our relation in the business—a contingency which was expressly excepted in our agreement. In your letter of the 14th inst. you say, that "Messrs. Mordecai & Co. are ready to receive the proceeds of the sugars sold by consent after any reasonable deduction for freight and expenses, which your clients may think proper to make;" and in the next sentence, you say, "but Messrs. Mordecai & Co. do not thereby commit themselves to the propriety or amount of any charges for which such deduction is made." Is it to be understood by this that the *Messrs. Budd* may or not commit themselves in carrying out the agreement, but that *Messrs. Mordecai & Co.* are not in any event to be committed? A part of the agreement was to deduct the "expenses," but who shall say that the several bills of expenses are correct? We have received Mr. Tobias' account sales, as well as Col. Brown's account sales; if these several account sales are overcharged, are we to take upon ourselves the whole responsibility, and to stand alone committed to the errors? The agreement of the 16th ult. surely did not contemplate a position so one-sided as this.

It has been my wish to reconcile the difficulty that has grown out of our agreement, and to this end I advised the Messrs. Budd to return the money received from Col. Brown, and his account sales, and so confine the settlement with Messrs. Mordecai & Co. to the sale made by Mr. Tobias. Upon this, they applied to Col. Brown, to have their settlement with him cancelled, but he has declined.

In your construction of our agreement, which was not made known to me, however, until *after* our settlement with Col. Brown, I have always been willing to *acquiesce*, provided it could be adopted without prejudice to that position which a different construction has led the Messrs. Budd into.

Respectfully.
E. DeTREVILLE.

Charleston, 18th Feb., '56.

MEM.—ACC. SUGAR, *stored by order Capt. Hinckley, Schooner "Mary Eddy."*

By balance Brown's Wharf, acc. as rendered,	$205 84	
By nett proceeds sales 49 hhds., by A. Tobias & Sons, ...	2,953 31	3,159 15
To freight, and interest on ditto, . .	759 05	
To balance paid Messrs. Mordecai & Co., .	2,400 10	3,159 15

Errors excepted.
Charleston, Feb. 7th, 1856.

T. S. & T. G. BUDD.
per R. J. Jeffords.

TENDER.

MEMORANDUM.

On the 7th day of February, 1856, I tendered to Mr. M. C. Mordecai, of the firm of Mordecai & Co., the sum of two thousand and four hundred dollars, and ten cents, in gold, except ten cents in silver, with above statement; also account sales of G. W. Brown & Tobias; that Mr. Mordecai refused to accept the same, and waived the necessity of counting the specie before him.

E. DETREVILLE.

Mr. Robert J. Jeffords was present, and witnessed the said Tender.

R. J. JEFFORDS.

Account Sales of Brown & Tobias, accompanying above Statement and Tender.

Schooner Mary Eddy, and Owners.

1856.	To BROWN'S WHARF.		
Jan. 22.	To storage 99 hhds. sugar, from April 4th, 1854, to Nov. 15th, 1855, at 25 cts. per week, ...	$1935 45	
	To removing and repiling same, by order of Port Wardens, Sep. 1855,	30 00	
	To weighing 50 hhds., Nov. 15, " .	12 02	
	To storage 49 hhds., from Nov. 15th, 1855, to Jan. 22, 1856, . .	112 70	
	To weighing same, . . .	18 76	2108 93
1855.	CR.		
Nov. 15.	By nett proceeds sales 50 hhds. sugar, as per acc't rendered, ...		2314 77
	By balance Cr. Mary Eddy, and owners, . .		$205 84

Jan. 26th, 1856.
E. E.

GEO. W. BROWN.

Sales at Auction of 49 hhds. Clarified Sugar, on account of all concerned, by order of Messrs. T. S. & T. G. Budd, nett proceeds to their credit

			Velosco.	Wt. nett.	Price.	
Cobia & Co.	3 hhds.	Sugar,	R.	2713	9 5-8	$261 12
			Velasco.			
Farrar & Bros.	8 hhds.	do.	A.	7264	9 1-2	690 08
Do.	38 hhds.	do.	A.	23388	9 1-4	2163 39
	49					
						$3114 59

Charges.

Advertising and labor, . . .	5 55	
Commission and Tax, 50 per ct. . .	155 73	161 28
Nett proceeds cash		$2953 31

E. and O. E.

Charleston, Jan. 22, '56. A. TOBIAS & SONS.

Reply of M. C. Mordecai, Esq., to Mr. DeTreville, upon a tender of a sum of money this day.

"I know nothing of the accounts. Our lawyers made you a proposition in writing, which, I am satisfied, they are ready to comply with, if you are ready to carry it out. As your communication has been through Mr. W. D. Porter, I refer you to him to settle any transaction that you and him have agreed to. I neither accept or decline, but refer you to Mr. Porter—he is the party, and not me.

February 7th, 1856.

District Court of the United States, for the District of South Carolina.

MORDECAI & Co., Libellants,
vs.
The Master and Owners of the Schooner MARY EDDY, Respondents. } In Admiralty.

The above named respondents conceiving themselves aggrieved by the final sentence or decree entered on this the 24th day of March, 1858, in the above entitled cause, do hereby appeal therefrom to the next Circuit Court of the United States, to be held in and for the said district; and they pray that this, their appeal, may be allowed, and that a transcript of the records and proceedings in the cause, duly authenticated, may be sent to the said Circuit Court.

(Filed 24th March, 1858.) E. DETREVILLE, Resp. Proc.

District Court of the U. S. for So. Ca.

M. C. MORDECAI
vs.
The Schooner MARY EDDY. } In Admiralty.

The above named libellants conceiving themselves aggrieved by the final sentence, or decree, entered on the day of last, in the above entitled cause, do hereby appeal therefrom to the next Circuit Court of the United States, to be held in and for the said district, upon the following grounds:—

1st. Because the decree allows the libellants the market value of the sugar at the time of filing the libel, instead of the highest market price in proof before the making of the decree.

2d. Because the decree charges the libellants with the storage of the sugars for sixty days.

3d. Because the decree condemns the libellants in costs up to the time of Judge Gilchrist's decree.

And the libellants pray that their appeal may be allowed, and that a transcript of the records and proceedings in the cause duly authenticated, may be sent to the said Circuit Court.

BROWN & PORTER, Libel's Proctors.

3d April, 1858. (Filed 3d April, 1358.)

In the Circuit Court.

MORDECAI & Co.
vs.
Schr. MARY EDDY.

Mr. Petigrew read the papers certified from the District Court.

Mr. Gray sworn and examined. (See testimony hereafter.)

Mr. McCrady was heard for Mordecai & Co., Mr. Porter was also heard on the same side, and Mr. Petigrew heard in reply for respondents.

9th December, 1858.

MORDECAI & Co.
vs.
Schr. MARY EDDY. } Order.

The parties, appellant and respondent, having been heard on the matters in controversy, the court, without pronouncing on the merits of the appeal, proceeds to make a provisional order for bringing into court the proceeds of the cargo of the Mary Eddy, out of which the contention in this case has arisen. It is therefore ordered that the appellants bring into court, to be retained in the registry thereof, the proceeds of the sales of said cargo in their hands, and that Geo. W. Brown do show cause in the court on or before the first Monday of April next, why the amount in his hands retained for storage of said

cargo should not be paid into court to abide such order as the court may make in the whole case, as presented for adjudication, by a final decree.

JAMES W. WAYNE.

Testimony of H. Y. Gray (clerk).

MORDECAI & Co.
vs.
Schr. MARY EDDY.

Mr. Gray, clerk Circuit Court, sworn.

I am clerk of the District Court of the United States, and entered the order and petition of June 16th, 1855. The petition was brought to a hearing and was refused. Does not remember whether the petition was argued before the court or whether the petition was resisted; thinks it was. The second petition referred to was refused. Does not remember distinctly whether the petition was opposed or not; thinks it was.

H. Y. GRAY, Clerk.

Sworn to before me, 27 Nov., 1858.
JAMES CONNER, Magistrate.

Thursday, 21st April, 1859.

MORDECAI & Co.
vs.
Schr. MARY EDDY.

Mr. Petigrew read the return of Geo. W. Brown to the rule taken out the November term, 1858, of this court.

Return.

George W. Brown, on whom a rule has been served calling on him to show cause, why the amount in his hands retained for storage, should not be paid into court, answers, and says: That he was, in the year one thousand eight hundred and fifty-four, the owner of a wharf in Charleston, and that the rates of wharfage are minutely regulated by law. That by the terms of law hogshead of sugar weighing over one thousand pounds are chargeable with twenty-three cents per week, and for every part of a week beyond the full number of weeks paid for. The ninety-nine hogsheads of sugar were stored with him on the fourth of April, one thousand eight hundred and fifty-four; that no bargain was made for the term nor the price of storage. That the owner of the sugar, as he understood, was resolved to make the carrier responsible for the detention of his sugars, and the carrier was resolved to brave the risk of insisting on his right to store the goods till his freight was paid. That this deponent had no duty to perform towards either of them, but to keep the sugar safely, which he did. That they owed him no duty but to pay him for storage at the rate fixed by law. That after the sugars had been in

store eighty-four weeks and upwards without any payment or tender of payment, this deponent exercised the right of selling enough of the cargo to satisfy the storage then due, and the balance was afterwards sold by an arrangement between the parties with which he had nothing to do. And that the sum retained by him is barely the amount due him for storage, for which his lien is secured to him by the law of the State; and he prays that he may be permitted to enjoy this right without being complicated with the quarrel between tho owner and the carrier of the sugars, to which, and to all the proceedings in this court he is a stranger.

Personally appears Geo. W. Brown, who, being sworn, deposes, that the matters and things set forth in the foregoing answer are true.

GEO. W. BROWN.

Sworn to before me this 8th of April, 1859.

H. Y. GRAY, Clerk.

Thursday, 21st April, 1859.

MORDECAI & Co.
vs.
SCHR. MARY EDDY.

1st. The court made the following order:—

It is ordered, that the libellants be at liberty to take out of the registry of this court the proceeds of the sale of the cargo of the Mary Eddy, which has been ordered to be paid into court, less the amount of freight and interest. The respondent waiving the right to require security.

21st April, 1859.

MORDECAI & Co.
vs.
SCHR. MARY EDDY.

Order of Court.

On motion of Brown & Porter, libellants' proctors, It is ordered, that George W. Brown do show cause, on or before the 25th day of May next, why the libellants should not have leave to amend their libel, by making him a party defendant, with apt words to charge him.

Wednesday, 18th May, 1859.

MORDECAI & Co.
vs.
SCHR. MARY EDDY.

Petition of Mordecai & Co.

To the Honorable James M. Wayne, Associate Justice of the Supreme Court and Judge of the Sixth Circuit.

The petition of Mordecai & Co., the libellants in the above entitled case, humbly showeth: That in a certain cause of admiralty and

maritime jurisdiction, in which your petitioners were the libellants, and the master and owners of the schr. Mary Eddy were respondents, lately heard before your honor upon an appeal from the decree of the District Court, it appeared from the evidence in the said cause and the answer of G. W. Brown to a certain rule upon him, ordered by this honorable court, calling on him to show cause why the amount in his hands, retained for storage, should not be paid into court: That ninety-nine hogsheads of sugar, the possession of which was the subject-matter of the controversy in the said cause, were stored in certain stores of him, the said George W. Brown, who was the owner of a wharf in Charleston, on the 4th and 5th days of April, in the year of our Lord one thousand eight hundred and fifty-four, some of them before and some of them after the filing of the libel in the said cause, subject to the order of Captain Jacob M. Hinckley, master of the schooner Mary Eddy, or his agents. It also appeared that he, the said George W. Brown, at the time of receiving the said hogsheads of sugar in his stores as aforesaid, was informed of and understood the nature of the controversy between the parties to this cause, and that the said ninety-nine hogsheads of sugar were the subject-matter of the impending and pending litigation; and that the said cause was first heard before the late Judge Gilchrist, who filed his decree, in favor of your petitioners, on the twenty-sixth day of May, 1854, from which decree an appeal was promptly taken to your honor in this honorable court. It also further appeared, that on or about the thirty-first day of August, in the year of our Lord one thousand eight hundred and fifty-four, while the said appeal to your honor was pending, and before it could be heard, your petitioners, apprehending a protracted litigation, sent to Messrs. T. S. and T. G. Budd, the recognized agents of the respondents, to inform them, that the said sugars could be stored at twenty-five cents per month per hogshead; to which they, the said T. S. and T. G. Budd replied, that the sugars had to be stored, and were stored at Brown's wharf, and that Col. Brown had told him that he would make it satisfactory to all parties. It further appeared, that afterwards, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and fifty-five, a petition for a sale of said sugars, on the part of the respondents in the said cause, was presented to his honor, the late Judge Gilchrist, whereupon your petitioners, on the nineteenth day of the same month and year, requested the said George W. Brown to allow them to examine the said sugars; but that he, the said George W. Brown, under the direction of the said Messrs. T. S. & T. G. Budd, refused to exhibit the said sugars to your petitioners, after having previously declared, in writing, that it would afford him pleasure to give your petitioners and their friends the opportunity of examining them; and that on or about the thirty-first day of October next thereafter, he presented a bill against Messrs. T. S. and T. G. Budd, agents of schr. Mary Eddy and owners, for the storage of said sugars for eighty-three

weeks, at the rate of twenty-three cents per week for each hogshead, and for extra labor on the same, storing and repiling same in September eighteen hundred and fifty-four, amounting to the sum of nineteen hundred and nineteen dollars and ninety-one cents, and notified the said T. S. and T. G. Budd and your petitioners, that unless the said sum should be paid on or before the sixth day of November next thereafter, that he, the said G. W. Brown, would cause the said sugars, or enough thereof to pay the said bill, to be sold. To which your petitioners replied, protesting against the said bill, and denying his right to sell said sugars. That thereupon, to wit, on the 2d day of November, in the year 1855, another petition was presented to the late Judge Gilchrist, in the name of said T. S. and T. G. Budd, alleging that there had been an appeal taken to the Supreme Court by your petitioners, to reverse your honor's decree upon the appeal from the decree of the District Court, and also the demand made by said G. W. Brown upon them for payment of his bill for storage, and praying that said sugar might be sold, and the rent in arrear be discharged, and the residue of the sales be brought into court, which was not granted.

That thereupon the said George W. Brown, nevertheless, without any judicial warrant or legal authority, proceeded to sell fifty of the said hogsheads of sugar; and afterwards, on the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and fifty-six, rendered an account thereof, whereby it appeared that the said fifty hogsheads had brought at auction the net sum of two thousand three hundred and fourteen dollars and seventy-seven cents; all which he claimed to retain, or to have expended on divers accounts, except the sum of two hundred and five dollars and eighty-four cents, as will appear by the said account filed as a part of the testimony in the said cause. And your petitioners aver, that the charges made by the said George W. Brown, are exorbitant, and cannot be sustained, and ought not to be allowed. That he, the said George W. Brown, and in his default the said T. S. and T. G. Budd, ought to pay the whole of the net sales of the said fifty hogsheads of sugar into this court, to abide the order and decree of this honorable court.

And your petitioners therefore humbly pray that an order may be made upon the said George W. Brown and the said T. S. & T. G. Budd, requiring them on a certain day and hour to be named therein to show cause why they should not bring the said nett proceeds of the said fifty hogsheads of sugar into this court, to abide the order and decree of this honorable court in this cause, in conformity to the provisions of the 38th and Rules of Court.

And your petitioners will ever pray, &c.

McCRADY & SON, Proctors for Petitioners.

Friday, 20th of May, 1859.

MORDECAI & Co.
vs.
Schr. MARY EDDY. } Order of Court.

On hearing the petition in this case, It is ordered that George W. Brown and T. S. and T. G. Budd do show cause at a special term of this court to be holden as hereafter may be ordered, or at the next regular term of this court, if any they can, why the residue or surplus of the nett sales of the fifty hogsheads of sugar sold in Nov. 1855, if any there be over and above a reasonable allowance for the storage of the whole ninety-nine hogsheads of sugar, should not be paid into the registry of this court. And it is further ordered, that it be referred to Henry Y. Gray, who is hereby appointed a commissioner for the purpose, to inquire and report what would be a reasonable allowance for the storage of the said sugar, and that for that purpose he be at liberty to receive any of the testimony heretofore taken in this case, and also to take any further testimony which may be offered by the parties, and to report the same, and that his report be put on file on or before the first day of October next.

JAMES M. WAYNE.

Wednesday, 2d November, 1859.

MORDECAI & Co.
vs.
Sch. MARY EDDY. }

The clerk made the following report in the case:—

The report of H. Y. Gray, Clerk of the Court, respectfully showeth, that under an order of this honorable court, dated 20th May, 1859, he has taken the testimony of several witnesses on the question of what would be a reasonable allowance for the storage of the sugars, and begs leave to refer to their testimony herewith filed, and marked Exhibit S, as a part of the report. From a review of their testimony, as well as of the testimony on this subject already in possession of the court, I am of opinion that good storage for sugars could have been had at the time mentioned in the premises, for 40 cents per hogshead per month, and the prevailing opinion of the witnesses is, that that would have been a reasonable and remunerating compensation for such storage.

I have in accordance with this conclusion made a statement of what the storage bill would amount to at this rate, the amount of the freight bill with interest added, the amount of moneys from the sales of the sugars paid into court, and the balance of the proceeds of such sales as now remains due to the owners of the said sugars. (See statement annexed.)

All which is respectfully reported. H. Y. GRAY, Clerk.

Statement.

Taylor's account sales of 50 hogsheads sugar,		$2,314 17
Charges.		
Storage of 99 hhds. of sugar for 84 weeks or 21 months, at 40 cts. per hhd. per month,	$831 60	
Removing and piling do.,	30 00	
Weighing 50 hhds. do.,	12 02	
Storage 49 hhds. sugar from 15th Nov. '55 to 22d Jan'y, '56 (10 weeks), 3 mos., at 40 c.,	58 80	
Weighing 49 hhds. do.,	18 76	
	$951 18	$951 18
		$1,363 59
Tobias' account sales 49 hhds sugar,		2,953 31
		$4,316 90
Deduct freight and interest,		759 05
		$3,557 85
Amount paid libellants from registry,		2,400 10
Balance due libellants,		$1,157 75

MORDECAI & Co.
vs.
SCH. MARY EDDY.
} Reference held 27 Sept., 1859.

Present Messrs. DeTreville & Porter.

J. Legare Yates sworn: Is in the habit of having sugars stored; has stored them at various rates, sometimes at 25 cts. and 37½ cents per month. At the time these sugars were stored he remembers storing sugars for 25 cts. per month. He thinks that was a reasonable price; there was no difficulty in getting storage then at that rate. On certain wharves for a length of time, say 80 weeks, he thinks he could get them stored at that rate now. He could get them stored on Union wharf—as good stores as any in the city. He would consider 25 cents per week for a long time an unreasonable, an exorbitant rate. He never knew of such a charge.

Cross-Examined.

Has seen the schedule of rates as fixed by law; has never stored by this schedule; he always has stored sugars out on contract; he does not receive sugars himself on storage. Has stored sugars pretty much on all the wharves in the city; has no particular place to store. Witness only speaks of his own experience in having sugars stored; he invariably stores by contract, never without. The highest storage

Friday, 20th of May, 1859.

MORDECAI & Co.
vs.
Schr. MARY EDDY. } Order of Court.

On hearing the petition in this case, It is ordered that George W. Brown and T. S. and T. G. Budd do show cause at a special term of this court to be holden as hereafter may be ordered, or at the next regular term of this court, if any they can, why the residue or surplus of the nett sales of the fifty hogsheads of sugar sold in Nov. 1855, if any there be over and above a reasonable allowance for the storage of the whole ninety-nine hogsheads of sugar, should not be paid into the registry of this court. And it is further ordered, that it be referred to Henry Y. Gray, who is hereby appointed a commissioner for the purpose, to inquire and report what would be a reasonable allowance for the storage of the said sugar, and that for that purpose he be at liberty to receive any of the testimony heretofore taken in this case, and also to take any further testimony which may be offered by the parties, and to report the same, and that his report be put on file on or before the first day of October next.

JAMES M. WAYNE.

Wednesday, 2d November, 1859.

MORDECAI & Co.
vs.
Sch. MARY EDDY. }

The clerk made the following report in the case:—

The report of H. Y. Gray, Clerk of the Court, respectfully showeth, that under an order of this honorable court, dated 20th May, 1859, he has taken the testimony of several witnesses on the question of what would be a reasonable allowance for the storage of the sugars, and begs leave to refer to their testimony herewith filed, and marked Exhibit S, as a part of the report. From a review of their testimony, as well as of the testimony on this subject already in possession of the court, I am of opinion that good storage for sugars could have been had at the time mentioned in the premises, for 40 cents per hogshead per month, and the prevailing opinion of the witnesses is, that that would have been a reasonable and remunerating compensation for such storage.

I have in accordance with this conclusion made a statement of what the storage bill would amount to at this rate, the amount of the freight bill with interest added, the amount of moneys from the sales of the sugars paid into court, and the balance of the proceeds of such sales as now remains due to the owners of the said sugars. (See statement annexed.)

All which is respectfully reported. H. Y. GRAY, Clerk.

Statement.

Taylor's account sales of 50 hogsheads sugar,		$2,314 17
Charges.		
Storage of 99 hhds. of sugar for 84 weeks or 21 months, at 40 cts. per hhd. per month,	$831 60	
Removing and piling do.,	30 00	
Weighing 50 hhds. do.,	12 02	
Storage 49 hhds. sugar from 15th Nov. '55 to 22d Jan'y, '56 (10 weeks), 3 mos., at 40 c.,	58 80	
Weighing 49 hhds. do.,	18 76	
	$951 18	$951 18
		$1,363 59
Tobias' account sales 49 hhds sugar,		2,953 31
		$4,316 90
Deduct freight and interest,		759 05
		$3,557 85
Amount paid libellants from registry,		2,400 10
Balance due libellants,		$1,157 75

MORDECAI & Co.
vs.
SCH. MARY EDDY. } Reference held 27 Sept., 1859.

Present Messrs. DeTreville & Porter.

J. Legare Yates sworn: Is in the habit of having sugars stored; has stored them at various rates, sometimes at 25 cts. and 37½ cents per month. At the time these sugars were stored he remembers storing sugars for 25 cts. per month. He thinks that was a reasonable price; there was no difficulty in getting storage then at that rate. On certain wharves for a length of time, say 80 weeks, he thinks he could get them stored at that rate now. He could get them stored on Union wharf—as good stores as any in the city. He would consider 25 cents per week for a long time an unreasonable, an exorbitant rate. He never knew of such a charge.

Cross-Examined.

Has seen the schedule of rates as fixed by law; has never stored by this schedule; he always has stored sugars out on contract; he does not receive sugars himself on storage. Has stored sugars pretty much on all the wharves in the city; has no particular place to store. Witness only speaks of his own experience in having sugars stored; he invariably stores by contract, never without. The highest storage

he ever paid was 40 cents per month, and this under contract; in former times he stored at cheaper rates than at present.

In Reply.

Being one who has sugars to store, and does not himself store sugars on charge, his opportunity is the better for learning the general rates of storage. When he has paid 40 cents per month, it was for convenience—it being near his store. Has never known or heard of sugars being stored at 25 cents per week.

J. LEGARE YATES.

Sworn to before me, this 27 Sept., 1859.

H. Y. GRAY, Cl'k Cir. Ct.

29th September, 1859.

At a reference—present Mr. Porter, Mr. De Treville, and Geo. Brown, in person—Mr. Wm. Keenhardt sworn: Is a port warden; has been a wharf owner from 1807 to 1836; has had much experience in storing goods. When he was wharf owner, the law allowed 15 cts. per week for hhds. less than 1000 pounds, and 23 cts. per week for heavier than 1000 lbs.; when stored for a long time, they usually made a contract; when no contract, they charged according to law. He would consider now 23 cts. per week an enormous charge for any length of time. He would say that 50 cts. per month would be a full and reasonable charge for storage of sugars now for any length of time. He says when there was no agreement, this act of the Legislature was a guide to parties. Sugar is seldom stored for a long time.

Cross-Examined.

When he was in business, they always made agreements when sugar was stored for a long time, or hired a store. In years 1854, '5, and '6, he was not in business at that time, and can't say what were the prevailing rates.

WM. KEENHARDT.

Sworn to, 29 Sept., 1859. H. Y. GRAY, C. C. C.

John R. Elford sworn: Has been a wharfinger; had charge of Boyce's wharf from 1835 to 1841; knows rates of storage then. Rates of storage of sugar were 15 cts. for less than 1000 lbs., and 23 cts. per week for hhds. over 1000; when there is no contract, he would not consider 23 cents per week unreasonable. Cotton and rice you can store in tiers; sugar you cannot. Within a few years past he has had to pay occasionally storage in sugar for a hhd. or two, and has seen no change from his former experience.

Cross-Examined.

Was not a wharfinger in 1854, '5, or '6. He would charge 23 cts. per week for a lot of 100 hhds. of sugar stored as long as 84 weeks, if there were no agreement to the contrary. Don't know

that he ever had sugar stored for that length of time. The new rates are understood to be in advance of former prevailing rates. Don't know as to sugar, but they are as to cotton and rice.

Sugar is seldom stored on tiers; on this account the act of the Legislature allows more for storing sugar than rice or cotton. The act allows 8 cts. for first and last week, and 4 cts. for the intermediate weeks for storing cotton and rice. JOHN R. ELFORD.

Sworn to, 29 Sept., 1859. H. Y. GRAY, C. C. C.

W. B. Heriott sworn: Is an average adjuster; bills of storage frequently come before him. The rates of storage of sugar vary in the bills brought to his notice; generally storage is charged per month, or a store is hired. The U. S. custom-house charges 37½ cts. per month and hire for labor—amounting probably in all to 50 cts. per month. In private stores, sugar stored for a long time, as 80 weeks, the storage would be per month. He thinks 50 cts. per month would be reasonable, but generally for so long a time a store would be hired. Don't know of a case of sugars stored for a long period without a special agreement. Has known the full rate prescribed by law paid for storage of general cargo when it was only for a short time.

Cross-examined.

Don't know a case when the storage of goods was for a long time, hardly extending beyond a month or 6 weeks. In year 1854, 5, & 6, he would not have passed, without remark, a bill for the storage of 100 hhds. sugar for 20 months, if they had charged over 50 cts. per month, this would have been the highest allowance.

WILLIAM B. HERIOT.

Sworn to, 29th Sep., 1859.

H. Y. GRAY, C. C. C.

James M. Stocker sworn: Has been wharfinger from 1850 to present time, of Palmetto wharf; he goes by the tariff of rates prescribed by the legislature, and charges 23 cts. per week per hhd. of sugar. If a lot of sugars were stored with him by consignee of a vessel without contract he would charge 23 cts. per week, without any definite time; he considers this not an unreasonable charge, but a fair one; he himself would charge it. This tariff of rates prescribed by the act has always been recognized by the merchants.

Cross-examined.

On Palmetto wharf, there was only one store until the present time. Has never stored a lot of sugars more than a month or two. His experience is confined to cases of this length of time. He has stored sugars for 25 cts. per month in some cases, where he had also the landing and wharfage, parties paying the labor.

Witness would stand to his rights under the Fee Bill, and there-

fore he thinks it a fair rate, and because some other things under the legal tariff are of low rates of storage. Generally when sugars are stored, they are upon contract; we very seldom get the full rates.

JAMES M. STOCKER.

Sworn to 29th Sept., 1859.

H. Y. GRAY, C. C. C.

Reference 30th September, 1859.

MORDECAI & Co.
vs.
Sch. MARY EDDY.

For libellant, J. P. Chase sworn: Has been wharfinger about 14 years on Union wharf, was so in 1854, 5, & 6. They have the largest and most extensive stores in Charleston, and approved by the U. S. Surveyors. From the years 1849 to 1857, we did store sugar for 25 cts. per month, and for a long time, say 20 months, would have been glad to get it; he thinks that in those years storage could have been got at that price in several stores. There is a good deal of competition for storage. The rates understood to be allowed by act of the legislature we never got.

Within the last 6 or 8 months we have taken a cargo of New Orleans sugar at 25 cts. per month. Recently the rates have been raised by the wharf owners on sugars above their customary rates, but not above those stated in the act of the legislature. The U. States, in distress cases, use our stores and charge 37½ cts. and allow us 18¾ cents, and the vessel pays the labor.

The wharf owners have raised their rates of storage very lately, because labor, wages, taxes, material, &c., have gone up so high in later years.

Cross-examined.

The stores on Union wharf are owned by John Fraser & Co., Carr, et al.; never in his recollection stored for more than 25 cts. per month, and always stored by contract. He would not like to receive sugars in the stores without a contract.

He thinks if a vessel put in in distress he would charge storage by the tariff of rates, in absence of contract. In distressed vessel they can get higher rates, because they don't come out of the consignees' pocket. They would charge the rates of the tariff, if they thought they could get it. Although they charged only 25 cts. per month for storage of sugar, he does not think 50 cts. per month would be too much for hhds. over 1000 lbs. On account of competition, they frequently store for less than the storage is reasonably worth. Rents of stores are a good deal higher than in 1854.

In Reply.

Twenty months is so long a period that he thinks at that time 25 cts. per month would be a good remunerating price for storage of a

lot of 100 hhds. of sugar; there would be no loss of time in use of stores. Has never known such a price as 23 cts. per week charged for such a lot for such a long time. Has had sugars on store for more than a year; the rates then were 25 cts. per month. They stored sugars at that rate at that time, because we could not get anything to pay us better. We present our bills for storage every six months. J. P. CHASE.

Sworn to 30th Sept., 1859. H. Y. GRAY, C. C. C.

Saturday, 1st October, 1859.

MORDECAI & Co.
vs.
Schr. MARY EDDY. } Reference.

Raymond Salas sworn: Says he has been storing sugars, as a merchant, for about 10 years. In 1854, 5, & 6, used to pay from 25 to 37½ per hhd. per month, and per week 10 cents. In those years, for a long period like 20 months, could easily store for 25 cents per month, there being no loss of use of store and labor.

Sugars are stored sometimes in two or three tiers. Knows of it being so on Union Wharves, where they have large stores.

Cross-examined.

Owns no storehouse, and only stores sugars out as a merchant.

No importer of sugar ever paid by the rates of the tariff as established by act of the legislature. Whenever he stores anything it is always on contract. In extreme cases, he has heard of 50 cents per month being paid or asked; never paid so much himself.

In Reply.

He is a large importer; has never heard of or paid so large a rate as 40 cts. per month per hhd. of sugar, for 100 hogsheads, for so long a period as 20 months; thinks it could have been got for 20 to 25 cents per month. R. SALAS.

Sworn to before me this 1st October, 1859.

H. Y. GRAY, Clerk.

2d Nov. 1859.

MORDECAI & Co.
vs.
Schr. MARY EDDY. }

Exceptions of Mordecai & Co. to the Clerk's Report.

Mr. Porter read the following exceptions of libellants:—

The libellants except to the report of the clerk and commissioner, in relation to the allowance for storage of the sugar, filed 1st Oct., 1859, on the following ground:—

Because it was proved that the libellants informed the Messrs.

Budd that good storage could be procured at 25 c. per month, and the evidence showed that storage could easily have been procured at that rate. And the commissioner should not have allowed any higher rate, particularly as the sugars were seriously damaged for want of sufficient care on the part of the store-keeper.

BROWN & PORTER,
Libellants' Proctors.

MORDECAI & Co.
vs.
Schr. MARY EDDY.

Exceptions of Geo. W. Brown to the Report of Mr. Gray.

1st. That the rates of storage in Charleston are regulated by law, and the charges as retained by him are such, and no other, as the law allows.

2. That he is no party to the proceedings in this case, nor interested in the quarrel between the libellant and respondent.

3. That as to him the report should have found that his charges were such as allowed by law, and that he was not responsible for the loss which the conduct of the parties have brought upon them, or at least not responsible in this action.

MORDECAI & Co.
vs.
Schr. MARY EDDY and Owners.

Answer of T. S. and T. G. Budd.

In answer to the rule in this case, dated the 20th day of May, 1859, T. S. and T. G. Budd respectfully show: That they have been advised and believe that the charges made by George W. Brown, the wharfinger, for the storing and keeping the sugars, are within the limits allowed by and are not therefore unreasonable; that from the evidence before the commissioner, it appears that the tariff of rates for storage, prescribed by law, is familiar, and well recognized by the merchants of Charleston, and always rules in the absence of any agreement to the contrary.

That these respondents, shortly after the sugars were stored, advised the libellants through their clerk, to see Mr. Brown and make their own contract about storage, but they declined to do this, and also declined to inform these respondents where storage could be procured at a lesser rate than the law allowed. That the conduct of the libellant in refusing to pay freight, made the use of a warehouse necessary; and these respondents, therefore, ought not to be liable for any of the necessary and lawful expenses thereof. That these respondents did all in their power to arrest a progressive and accumulating expense of storage, and as early as June, 1855, they applied to the late Judge Gilchrist for an order to sell the sugars, and out of the proceeds to pay such storage as had already accrued and

to keep the surplus in the registry of the court to abide the appeal then pending.

That this application and another one of like import, made in November of the same year, were successfully opposed by the libellants. That, whether these repeated applications could be properly entertained by the court or not, they at least showed a desire on the part of these respondents to co-operate with the libellants in avoiding further expense of storage, and the consent of the libellants could have effected this object, without committing them to the bill of storage then due.

That these respondents always refused to pay the bill claimed by George W. Brown for storage, and that it was in consequence of their refusal to pay said bill that the said George W. Brown sold the sugars, alleging that he had a lien on them for the storage, and a right to sell to satisfy the same.

That these respondents disclaim all complicity with the said G. W. Brown in setting up and charging the rates he has for storage, and they respectfully submit, that, if these rates are excessive and unreasonable, the said George W. Brown, who has acknowledged payment of the same, should alone be held responsible.

T. S. & T. G. BUDD.

Sworn to before me this 1st Nov'r, 1859.

E. DE TREVILLE, Not. Pub.

Tuesday, 3d November, 1859.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

Order of Court.

It is ordered, that the decree of the District Court be reversed; that there be allowed to the owner of Brown's wharf, for the storage of the merchandise, a reasonable compensation according to the report of Mr. Gray, which, in this regard, is confirmed. That the residue of the fund in the hands of George W. Brown be paid into court. That libellants be at liberty at any time to apply to this court to take it out, and that subject to such leave, after the fund is paid into court, the libel be dismissed with costs.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

Return of George W. Brown.

And the said G. W. Brown, in return to the rule ordered to issue against him, submits, by way of reply, that all the proceedings against him in this court are without and beyond the jurisdiction vested in this court.

That the original proceeding, by way of libel, brought into the

possession of this court the schooner Mary Eddy to answer to M. C. Mordecai for an alleged breach of a contract of affreightment in the non-delivery of a cargo consigned to the said M. C. Mordecai.

That the proceeding was *in rem.*, and by it the vessel, or in lieu of it, the stipulation, filed in this court, became subject to answer to the libellant according to the judgement of this court.

That this respondent was intrusted with the cargo, as a storekeeper, and thereby became entitled to certain compensation and became also liable to certain duties. But that his connection with the cargo was but a bailment according to the common law, or such special statutes as may affect it; and that such bailment was and is in no manner a maritime contract. That, because therefore the subject-matter of his contract, that is, the cargo of the libellant, never was in the custody of the court, nor the subject-matter of any proceeding here, except so far as its non-delivery created a charge upon the vessel, for which the vessel was liable; and because his connection was only with the cargo and never with the vessel, and out of such connection can only arise liabilities to be decided in the courts of Common Law jurisdiction and not in the admiralty, he prays that this may be held and taken as exceptive to the jurisdiction of this court, and being so held, that he be, therefore, discharged from all further obligation to answer the said rule, and be hence forever discharged.

PETIGRU & KING,
Proctors.

Saturday, 24th Nov., 1860.

MORDECAI & CO.
vs.
SCH. MARY EDDY.

The court made the following decree in this cause:—

A rule having been taken out in this case, on the 20th May, 1859, calling on George W. Brown to show cause why the surplus of nett sales of the fifty hogsheads of sugar sold in November, 1855, if any there be over and above a reasonable allowance for the storage of the whole ninety-nine hogsheads of sugar, should not be paid into the registry of this court; and a return having been made to the said rule by which it appears that the sugars mentioned in said rule were never in the custody of the court, it is ordered that the said rule be discharged, and the decree of the District Court in all things reversed, and the libel dismissed with costs.

JAMES M. WAYNE,
Associate Justice Sup. Ct. U. S.

24 Nov. 1860.

(Attest:)
H. Y. GRAY, Clerk Cir. Ct.

And now, Mr. McCrady, proctor for libellants, prayed an appeal to the Supreme Court of the United States, which prayer was allowed.

United States of America, South Carolina District.

Know all men by these presents, that we, Moses C. Mordecai, J. E. Hertz, J. A. Enslow, and J. R. Mordecai, trading under the firm of Mordecai & Co., and Jos. L. Tobias, are held and firmly bound unto W. & N. Lindsay, in the full and just sum of twelve hundred dollars, lawful money of the United States, to be paid to the said W. & N. Lindsay, or their certain attorney, executors, administrators, and assigns, to which payment well and truly to be made and done, we bind ourselves and each and every of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated the twenty-sixth of November, A. D. one thousand eight hundred and sixty.

Whereas, a libel was lately filed in the District Court of the United States for the South Carolina District, by the above named Mordecai & Co. against the schooner Mary Eddy, her tackle, apparel, &c., and the above named W. & N. Lindsay came and claimed to be the sole and lawful owners thereof, and the said court (after further proceedings had under the mandate of the Supreme Court of the United States, did, on the 24th of March, A. D. 1858, pronounce a decree in favor of the libellants. And whereas, the said W. & N. Lindsay, claimants aforesaid, afterwards interposed an appeal to the Circuit Court of the United States for the said district, which was allowed, and the said Circuit Court, after hearing argument, did "Order and decree that the decree of the District Court be reversed in all things, and the libel dismissed with costs."

And whereas, the said Mordecai & Co. have interposed an appeal to the Supreme Court of the United States to be holden at Washington:

Now the condition of the above obligation is such, that if the above named Mordecai & Co. shall prosecute their appeal to effect and answer and pay all such damages and costs as shall be adjudged and decreed by the said Supreme Court if they fail to make their claim good, and in all respects conform to and abide by such order or orders as may be made in the premises, then and in such case the foregoing obligation shall be void, or else to be and remain in full force and virtue.

M. C. MORDECAI, [L. S.]
J. E. HERTZ,
Per Att'y, JAS. SALVO. [L. S.]
J. A. ENSLOW, [L. S.]
J. RANDOLPH MORDECAI, [L. S.]
JOS. L. TOBIAS. [L. S.]

Sealed and delivered before me,
H. Y. GRAY, Clerk Cir. Ct.

H. Y. G., C. C. C.

(Citation.)

To the owners of the schooner "Mary Eddy."

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to an appeal from a decree of the U. S. Circuit for South Carolina District, wherein Mordecai & Co. are appellants, and you are appellees, to show cause, if any there be, why the said decree should not be corrected and speedy justice be done to the parties in that behalf.

Witness, the Hon. James M. Wayne, Associate Justice of the Supreme Court of U. States, this 24th of November, one thousand eight hundred and sixty.

Signed, JAMES M. WAYNE,
Associate Justice Sup. Ct.

I acknowledge service of this citation.

E. DeTREVILLE,
Respondent's Proctor.

Clerk's Certificate.

I, Henry Y. Gray, Clerk of the U. S. Circuit Court for South Carolina District, do hereby certify, that the foregoing and annexed sheets contain a true and correct copy of the proceedings had in the said court, in a case wherein Mordecai & Co. were libellants, and the owners of the schooner Mary Eddy were respondents, the same being on file in this office.

Witness my hand and the seal of said court, this twenty-
[SEAL.] fourth day of November, A. D. one thousand eight hundred and sixty.

H. Y. GRAY, Clerk.

Filed 17th December, 1860.